No. 77-1419

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

GRIFFIN B. BELL,
ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Petitioners,

v.

SOCIALIST WORKERS PARTY, ET AL.,

Respondents.

APPENDIX TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

Order of March 9, 1978, of the
United States Court of Appeals
for the Second Circuit

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of March, one thousand nine hundred and seventy-eight.

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In re:

UNITED STATES OF AMERICA 77-3041

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioner, and no active judge or judge who was a member of panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Chief Judge
IRVING R. KAUFMAN

APPENDIX B

Proceedings before the District Court of July 29, 1976

* * *

THE COURT:

* * *

I have worked further on the objections made by the Government, the legal objections to the Federal Tort Claims Act, and I think this -- I don't want to cut anybody short, but I think that it would be most improper for me at this juncture of the case to dismiss the claims as now stated by the plaintiffs against the Government under the Federal Tort Claims Act on any of the grounds referred to.

What I have in mind, according to the considerations I have given this and the papers which have been furnished to me, it seems to me that a great deal of progress has been made, an immence amount of progress has been made, in crystallizing

and defining the exact nature of the claims against the Government under the Federal Tort Claims Act on any of the grounds referred to.

I think we are all grateful we have gone through this process.

But for me to take those claims and dismiss them or strike them on any of the legal grounds briefed by the Government, I think that would be inappropriate.

As far as the question of whether the administrative claim was duly filed within two years after the accural or discovery of the claims, I think it is abundantly clear that that question raises factual issues on which there is nothing conclusive in the record as yet. I don't take the original complaint as conclusive. It is a factor, but this is a factual question, and the record has to be developed fully enough to reach a resolution.

As to the other points made by the Government, whether the particular type of claim is valid under the law of the place within the meaning of the Federal Tort Claims Act or whether it comes within or does not come within one of the express exclusions, again it seems to me the record is far from developed enough to decide that.

The nature of the claims, the facts to be proved, all of that has to be developed much more specifically than it is at this stage.

We have a general nature of a claim; for instance the disruption program. What is in fact going to be proved or not proved by the plaintiffs with respect to the disruption program? What kinds of acts are proved? At that point it will be possible to reach some kind of decision as to whether that is a valid claim under the law of the place as defined in the Federal Tort Claims Act, or whether it is or is not a kind of claim that

is excluded by the express exclusions.

Maybe some elements of the plaintiff's claims will be valid; maybe some elements won't.

I think both with respect to the statute of limitations issue and the other issues which have been briefed, I see no way under which the validity or non-validity of these claims can be definitively decided at this point.

In theory these are threshold questions, but in fact in this case I daresay they will probably not be able to be decided until after a full trial.

I don't think that's really going to hurt the case in terms of efficiency, because the Federal Tort Claims Act causes of action are only part of a very broad action which involves a lot of other claims, and so I make that statement now because I think that I have gone through these papers that have been submitted to me and tried to reach a resolution of these issues.

I think that counsel ought to know my views so that they can plan what they need to do and they are not under the impression that some big chunks of the case are going to be thrown out. I don't see how it is possible to do any such thing.

I know that we had originally said there would be no argument today on those issues, but that possibly meant that we would get together at some time next week or, indeed, at a later point, and have the argument or further argument on those issues.

In view of all the things we have got to worry about and all the things we have to do, I'm not sure anything is to be gained by gathering for another session and having further argument on those issues.

We had extensive argument before. The argument was very effective and very helpful on both sides, and a lot was accomplished in the narrow-

ing of the claims.

I don't think, really, that any amount of argument is going to convince me that any of these claims should be stricken as now stated.

The administrative claim that was filed in 1975 was on behalf of what plaintiff?

MR. BOUDIN: Two organizations, the SWP and YSA.

THE COURT: What I'm doing now is not writing a formal decision. If I were to dismiss or strike claims I would obviously write something much more formal or dictate something much more formal, but I think from a practical standpoint this is really all that's necessary.

If the Government feels that something more needs to be done at this juncture on this subject, speak up, but what I am really trying to do is make sure that we spend our energies along profitable lines.

MR. BRANDT: Your Honor, if I may speak up on behalf of the Government, we believe there are several very, very practical reasons why your Honor should decide the issues that are presented on the statute of limitations.

The first one, your Honor, is the fundamental question of your Honor's ability to grant damages under the Federal Tort Claims Act, and that's all we are talking about; it goes to the jurisdiction of this Court to even hear the case in the first place.

THE COURT: I have a right to hear enough to determine my jurisdiction and, of course, that goes to whether you call it jurisdiction or statute of limitations.

You know the case that just came down decided by Judge Smith. The Court of Appeals remanded the case because it was felt that a factual issue was raised as to the accrual of

the cause of action.

I feel that factual issues are raised here on the subject of the accrual of the cause of actions that are asserted by the YSA and SWP in respect to the disruption program and the use of informers to manipulate. I think that's the second. Those are two of the three claims asserted as now defined by those two entities.

Then we have the claim about the break-ins, and that, of course, is something that again I think there are questions of fact about the 92 or so break-ins, when that accrued or when that was discovered by the plaintiffs or should have been discovered.

Obviously if there were not questions of fact and if it was all that simple, I would be delighted to resolve it. But I am convinced there are questions of fact which are not resolved on the present record as to the accrual time or the

discovery time -- however you want to phrase it -- of each of those claims.

MR. BRANDT: Three things:

First of all, we distinguish the Camire case and the situation. In that case we think there was a different fact question involved there.

THE COURT: Of course there was. I know that.

MR. BRANDT: In that case the plaintiff didn't know the nature of the injury and what caused it, and I think, your Honor, in this particular case -- I don't mean to get to the merits, but to respond to your question I think I have to -- the government believes that plaintiffs knew how they were injured and knew who it was who was injuring them. That's what distinguishes --

THE COURT: Have you taken depositions on this subject?

MR. BRANDT: We have, and we have information annexed to Mr. Mosley's affidavit concerning

this and Mr. Siffert's affidavit. We do have information concerning this, your Honor, and we believe, your Honor, that as far as this issue goes, it's a very, very limited evidentiary issue, and if we want to have that hearing, we don't think that that hearing would take more than a couple of hours. This issue will be resolved. It will greatly simplify the issues at trial.

THE COURT: I am perfectly willing, if it is practical, to have a separate preliminary trial on the statute of limitations. I know there may be some problems about that. There are some jury questions that have been raised. I am certainly willing to consider having a preliminary trial on the statute of limitations.

All I am saying is that for the sake of what you do between now and September, I don't want to leave this hanging. I am prepared to state that on the present record I believe that the issues are not resolved sufficiently for me

to strike any of the claims.

If a further record is developed, if it's appropriate to have a preliminary trial and further develop the record in that way, then I would be happy to consider having such a preliminary trial.

If it is a short one, all the better, but all I am saying is right on the present record I don't think it's resolved.

MR. BRANDT: If your Honor could carefully study the affidavits, and I know some of them were not given to your Honor until late last night, concerning some of the information that's in the depositions, some of the information that has been supplied by the plaintiffs and in documents produced concerning this very issue, I think your Honor that the record may be sufficiently developed, and it seems to me that in addition to factual questions that your Honor believes are

open, I think that some of the factual questions are matters really of law concerning what the effect of the allegations in a complaint are.

THE COURT: I just disagree with that. I'm prepared to say that right now.

I don't think there is anything in the original complaint which as a matter of law, in and of itself, prevents the assertion by the SWP or the YSA of a claim about an FBI disruption program, the use of informants for manipulative purposes or the 92 burglaries.

I have studied that original complaint very carefully and, of course, there are some very general provisions and some very specific provisions, but, if anything, I think my reading of the complaint is that it is basically a complaint about an improper surveillance through informants and otherwise, an improper gathering of information, and an improper use of the information gathered.

I don't think that there is anything that could immediately be interpreted as referring to the kind of things that went on in the disruption program, the unique features of that program, or the unique features of this alleged use of informants to manipulate.

As far as the burglaries, there are some specific burglaries referred to and then there are those bombings. We all have in mind what that is.

The burglaries for which the Tort Claims Act claim is being made are the 92 that the plaintiffs say were revealed to them this spring.

Isn't that right?

MR. BOUDIN: Quite right.

THE COURT: So Mr. Boudin is not trying to, on behalf of his clients, make a claim as to burglaries that were alleged in the original complaint.

I'm repeating what has been said numerous

times, hat my view is that it is question of fact and the contents of the original complaint are part of the factual picture as to when these plaintiffs discovered, or should have discovered, their claims. The kind of claims they are asserting, it is not legally conclusive against the plaintiffs and I am prepared to say that right now.

MR. BRANDT: If I am --

MR. BOUDIN: May I interrupt for a moment?

Your Honor rendered a decision forty minutes ago and now Mr. Brandt is going on and on and on. It seems to me that at some point the time ought to come when a decision of the Court is accepted and we move forward.

THE COURT: I probably took you all by surprise by bringing this up. I just want to try, with all the work we have to do, not to spend time needlessly. I put my views on the record.

I am perfectly happy to have Mr. Brandt comment.

MR. BRANDT: Thank you, your Honor.

I was responding to your Honor's request that the Government respond to your Honor's ruling in spite of Mr. Boudin's remarks.

THE COURT: Go ahead.

MR. BRANDT: If I may, our memo of law, supplemental memo of law, we filed I think this morning and it was delivered to your Honor late yesterday evening, that argues that as a matter of law -- a matter of law -- Mr. Boudin's clients did not have to be aware of the unique features of the disruption program in order to start the accrual of the statute of limitations. Ir argues that they did not have to be aware of each and every entry in order to start the accrual of the statute of limitations. They did not have to be aware of each and every improper use of an informant in order to start the statute of limitations running under 2401(b), and we think that those questions are a matter of law and not of

fact.

We think that the record factually is sufficient at this point to demonstrate that the statute could start.

I think that the problem here is separating the factual issue from the legal one.

I believe, your Honor, that the memo of law really puts that issue very, very squarely.

THE COURT: It puts it squarely, but I don't agree with you. I don't agree with you. Your cases are not apposite here.

For instance, we don't know yet fully and precisely what it is Mr. Boudin's clients will be able to prove or attempt to prove in respect to the disruption program; therefore, how can I sit here and say that his claim is the same as something that was known or should have been known back two years earlier?

I would like to deal with a factual record

and when it is perfectly permissible, it is a very live issue. As these claims are proved or attempted to be proved, you can ask, you can inquire, in any way appropriate and as thoroughly as you want to inquire, on everything that would indicate when Mr.Boudin's clients knew of the type of thing they are proving, when they knew of related things,or when they knew of the general subject, but until we know more about the specifics of what Mr. Boudin will be trying to prove about the disruption program as respects his clients, I don't see how I can sit here and say that this is something that was known about at the time of the original complaint, or was known about at any other time.

I don't know when it was known or should have been known because I don't know what it is definitely that he is going to try to develop proof of.

MR. BRANDT: We do know what was in the original complaint.

THE COURT: We have said that many, many times, and I have read it and I have reread it.

MR. BRANDT: We believe, your Honor, that, as a matter of law, the issues that were raised in the original complaint started the statute running.

THE COURT: I think we are getting repetitious. I just ruled against you.

I disagree with you.

MR. BRANDT: I would also like to add that, as a matter of factual record, we have developed -- we have George Novak's deposition and his testimony and that is appended to Mr. Moseley's affidavit as Exhibit B, that it was common knowledge that Government informants "influenced the organization in injurious ways" from their mere presence in the organization.

The last part is not the quote.

We think we have developed the factual record sufficiently --

THE COURT: In my view it would be so inappropriate -- I can't tell you how inappropriate -- to throw out their claims on the basis of that kind of general statement.

MR. BRANDT: Let me ask two questions:

(a) Will your Honor permit a preliminary hearing on this?

THE COURT: What I would like to do is when we are all assembled together in the fall, I would, of course, consider doing that.

The question as to whether that is feasible depends on whether we really have a relatively simple isolated issue, or whether we simply get into a whole long range of proof which will in large part duplicate what will be done at the trial.

I don't know the answer to that. If it's

simple, if there are some fairly simple factual inquiries that can be made and resolve the statute of limitations issue and resolve it in your favor, or resolve it one way or the other, why, that's all to the good.

But what I would say to you is this: I would try to work out a plan, if you want to propose a separate preliminary trial, of what that trial would consist of, and discuss it with Mr. Boudin. Then Mr. Boudin can formulate his ideas of what a trial of that kind would consist of, and then we have to worry about whether it would end up being something that would have a lot of elements of a full trial. Maybe it would and maybe it would not.

But I'm not going to try to say now that I would have it. I would simply say that I think you are entitled to propose it because, you know, at a first blush the statute of limitations very often is a preliminary issue, a threshold issue.

I don't want to fall into the thing and then end up with a three-week trial.

MR. BRANDT: Let me suggest this in that regard:

We think that that would be a useful way for us to spend part of the month of August, but I think it would be very, very profitable for the Government if your Honor would give us a ruling, an opinion, concerning what precisely, what facts, need to be known in order that the statute of limitations start to accrue.

For example, is it the precise entry that occurred between 1960 and 1966? Is that what starts it? Or a general allegation concerning entries, would that start the accrual running? That's one of the issues which we believe and we --

THE COURT: What is your question?

MR. BRANDT: I think the question is this:

In order for the statute of limitations to run, what knowledge does plaintiff have to have? Do they have to have knowledge of the precise entry that occurred? Or would general knowledge concerning entries over a long period of time start the statute of limitations running?

THE COURT: It depends on what they are alleging. If they are alleging a cause of action on behalf of some plaintiff for a specific breakin, then it would seem to me -- I don't know what could occur otherwise, but just talking out loud, thinking out loud with you -- that the accurate of the cause of action would be the time when they knew or should have known about this specific breakin. When I say "they," I mean whoever is going to try to assert the claim.

If it is a general claim of conspiracy or plan about breakins in general -- maybe you have something different -- then the question would be

when they knew or should have known about that general claim.

As I understand it, the third type of claim asserted by the plaintiffs under the federal tort claim is specifically relating to the 92 specific breakins. I don't know exactly the form of that claim.

And I understand they are filing or are in the process of filing administrative claims. I don't know on whose behalf those claims will be filed. I have not seen them. I don't know if they have been filed, but --

I guess I can ask that right now.

MR. BOUDIN: They have been filed, yes.

THE COURT: Have you shown those to Mr. Brandt?

MR. JORDAN: Have you seen copies of those?

THE COURT: Give him copies and then we will have something concrete to talk about.

Who are they on behalf of?

MR. JORDAN: SWP and the YSA.

THE COURT: Those were the offices broken into?

MR. JORDAN: Yes.

MR. BRANDT: That is a six-month process.

THE COURT: That can be cut short if you want to deny the claims.

MR. BRANDT: The other thing is --

THE COURT: You asked a question and I'm trying to give you an answer.

As far as the disruption program --

MR. BOUDIN: May I raise an objection to this entire discussion? I object very strongly to the Government coming in after your Honor has made a decision and cross-examining your Honor.

This is not proper. Your Honor is not called upon to give an advisory opinion to Mr. Brandt because he doesn't like your opinion. The problem is not one of form or deference to the Court.

The point is in the examination by Mr. Brandt of your Honor who happens to be a judge and not a witness. I am not being able to intervene and to play a part in the thing. It goes right through everything the Government is doing here.

There must be a time when a matter can be accepted by the Government.

THE COURT: In about five minutes there is going to be a time.

I am trying not to be sticky here. I think I injected something into this hearing, and I feel somewhat apologetic for doing that, but, again, we have a hearing just about every day in this case.

If I can make myself clear this afternoon so I am not keeping you dangling to September as to what my views are, I think it is to your advantage.

If I waited and wrote some formal decision,

which I think is completely useless, I am sure it would be September before I would do it. I don't see any purpose in that nor do I really see any purpose in gathering for some further formal argument tomorrow or next week or any other time.

I think that we have gone into this so much and we will go into it another few minutes. This is repeating what we have talked about. But the reason I am going farther is because whenever it is, we come back to this either in a preliminary hearing or at the trial. We are going to have to frame the issues, and when you go into it on your discovery you are going to have some idea of the issues, so I am discussing with you the issues. That's all.

My ruling has been stated, as Mr. Boudin observes. The ruling, to repeat, that I am denying any and all applications by the Government to dismiss or strike the federal Tort Claims Act

claims against the Government as presently formulated in the letter of -- just so we have a reference, I guess that would be helpful.

MR. JORDAN: If you had our most recent memorandum, I think it's on page 2 of that, your Honor.

THE COURT: I happened to be looking at the Government's memorandum.

MR. MOSELEY: It's on page 4 of our memorandum.

THE COURT: Page 4 of the Government's memorandum, and pages 2 and 3 of the plaintiffs' memorandum; the plaintiffs' memorandum being dated July 27, 1976 and the Government's memorandum undated.

I wish the Government would date its memorandums.

MR. SIFFERT: The steno pool refuses to do that, your Honor.

THE COURT: In any event, I am denying the application to strike those claims, and I'm doing it because I think they are factual issues not resolved by the present record.

I will comment for another minute to give what guidance I can as to the issues.

It seems to me that with respect to the first claim about the disruption program, the issue is as follows:

How different is this claim from what was known or should have been known before the spring of 1975? And that really doesn't say anything. I don't know why I bother saying it, but, in other words, if this is something, the nature of the activity, and the purpose of the activity, that is, the use of letters, for instance, to accuse people of sexual misconduct so that their marital relationships are broken up, and that kind of thing, which was mentioned in the Church report,

if that was something involving a different method and perhaps a different purpose from what was revealed and known before, it may very well be enough to constitute a different claim stated as such, and, therefore, it may be that the question is: When did the plaintiffs know or should they have known of these different types of alleged activities and the purposes of such activities?

I think what I am saying now is pretty obvious. I think we can probably suspend.

I think in your discovery you should keep in mind the factual issues and develop them and then, if anybody in the fall wants to apply for a separate preliminary trial on these issues of jurisdiction or statute of limitations, federal Tort Claims Act, they are free to do it.

All right.

We have no further hearings scheduled, I understand.

MR. BRANDT. Your Honor, if I could take the opportunity at this point -- I know your Honor wants to finish today -- there are other practical considerations why we think this motion should be decided, if I can just make a suggestion.

May I address this in a letter to your Honor with a copy to Mr.Boudin concerning the practical considerations why your Honor might want to accelerate the process as to a decision?

THE COURT: To what date do you think I should accelerate it?

MR. BRANDT: That your Honor decide the issue of the statute of limitations --

THE COURT: Don't start a barrage of correspondence. This matter, as far as I am concerned, is off until the record is further developed and until someone -- after the beginning of September, when we are all back in New York, if anybody feels that they are ready for a preliminary trial using whatever is in the record now, and any additional

materials that are available now, if anybody wants to apply for a preliminary trial, if it's a short preliminary trial, that's fine.

But I tell you right now I'm not prepared to hand down any further ruling until that time.

MR. BOUDIN: And I wish your Honor and Mr. Brandt and your clerk a happy vacation.

I think we all deserve it.

APPENDIX C

Proceedings before the District Court of October 21, 1977

* * *

THE COURT: * * *

I invited the government at least a year ago to suggest a preliminary trial. You didn't so suggest. We spent all winter on the merits, so to speak, of the discovery problems, both with respect to the CIA and the FBI and also the YSA, and an immense amount of labor was undertaken throughout the two agencies.

I wasn't told you didn't need a decision on the merits and those things, and you won on two-thirds of your arguments. Then you lose, and you went up, and at no time did you ask for a preliminary trial, and then you went to the Court of Appeals and you talked about the possibility of a preliminary trial up there, having never requested it of me, and now, after you have lost in the Court of Appeals, despite the recommenda-

dations made to the district judge, you come back now and at this late date you ask about a preliminary trial. A lot, an immense amount of work has been done on these discovery problems by me, by your clients, and to some extent by Mr. Boudin's firm by way of briefing, although they didn't have any opportunity to see any of the materials and they were spared in a certain sense the labor of looking at all those cubic feet of files.

MR. MOSELEY: Your Honor --

THE COURT: As far as the preliminary trial on the statute of limitations question, I suggest from the standpoint of any sensible administration of this case, that that discussion should have been made at least a year ago.

MR. MOSELEY: Your Honor --

THE COURT: It wasn't --

MR. MOSELEY: Your Honor, in that connection --

THE COURT: And the Court of Appeals wasn't

really talking about that in any event.

MR. MOSELEY: The Court of Appeals, your Honor, suggested that the questions on need for disclosure could be resolved through the beginning of the trial.

THE COURT: I have read the Court of Appeals opinion. I am fully familiar with it, as we all are. I take it that you, according to this document which you handed me, you are now up in the Court of Appeals again.

MR. MOSELEY: Your Honor, we may be seeking reconsideration. The reason why I am here today is to ask your Honor whether we will have a modification of your Honor's order which will obviate the government's need to consider further appellate remedies.

If I may go back --

THE COURT: No. Look, as far as a preliminary trial on the statute of limitations, I will not have it. So the answer to that is, "No."

It is way too late for that. There is too much water over the dam. Your request is at least a year too late, I repeat.

There will be no preliminary trial on the statute of limitations.

MR. MOSELEY: If I may be heard, we don't envision that in any way as a delay or a preliminary trial. We believe that this is the way to proceed withthe entire case to trial.

THE COURT: Why didn't you make that request a year ago?

MR. MOSELEY: As I recall--

THE COURT: A lot of sweat would have been saved.

MR. MOSELEY: Indeed, it perhaps would have, but your Honor rejected that alternative specifically on the record of the transcript of April 14, 1977. Your Honor also directed us to--

THE COURT: That was April 1977, after most

of the work had been completed.

MR. MOSELEY: But that was at your Honor's direction earlier. The government, rightly or wrongly, followed in the pattern that your Honor directed for the consideration of these issues. We are suggesting here --

THE COURT: That is simply nottrue, Mr. Moseley. It is not true. If you can show me any application by you, a timely application -- and I am talking about an application made following my ruling on the government's motion to dismiss and before the very extensive labors through the winter of '76 and '77 about the FBI, the CIA, and the NSA discovery problems--if you will show me any application by you for a preliminary trial on the statute of limitations and any denial by me, I will certainly be happy to see it, and I will owe you a very deep apology.

At the time I denied your motion to dismiss,

I invited the government, if they wished, to propose a preliminary trial. I didn't make any commitment to hold it, but I said I would consider it.

I don't recall any further word from you. If something came from you in the spring of 1977 after all the work was over, that is not what I am talking about.

MR. MOSELEY: Your Honor--

THE COURT: You review the record and if you come up with something along that line I certainly will stand corrected.

MR. MOSELEY: Your Honor, if I may proceed along those lines, what happened is that motion to dismiss was an omnibus motion directed to all the plaintiffs' various causes of action.

Following the denial, the plaintiffs zeroed in on or honed in on the question of the informant issue. That was briefed at some length. As a

result of that, your Honor directed a procedure for the solution of that problem.

Perhaps at that time the government should have made a request --

THE COURT: What do you mean, at that time? You could have done it months before then. I ruled on your motion to dismiss in early August, if I am correct, or late July of 1976. What were you doing during the next six weeks?

MR. MOSELEY: During the next six weeks, your Honor, we were responding to a variety of your Honor's and plaintiffs' requests with respect to discovery. I don't think that is in essense responsive. The question here today is - the Court of Appeals suggests that this matter--as any number of large or major litigations; anti-trust litigations, my major experience--proceed with trial so that preliminarily the issues relevant to the kinds of discovery that introduced into the disclosure of privileged materials

can be resolved.

I don't think that is a delay in any way, shape or form.

THE COURT: What would those issues be?

MR. MOSELEY: The first and principal issue would be the statute of limitations.

THE COURT: That is exactly what I am talking about.

MR. MOSELEY: That is certainly one of them, your Honor. There are others. We believe provisions of the Federal Tort Claims Act would preclude the vast majority if not all the relief the plaintiffs seek in damages with respect to informants.

We believe those would be presented in brief and argued in a way that would get us around the problems that we largely face in respect to this and would obviate the further need of appellate review and protraction here.

THE COURT: What else do you propose?

MR. MOSELEY: That is what we propose, your Honor.

THE COURT: Well, let me say this--

MR. BOUDIN: Would your Honor care to hear me for a moment?

THE COURT: Just a moment. When I read the Court of Appeals opinion, and even now, I don't have in my memory all of our discussions and transactions that went on in connection with your motion to dismiss, which I think was before the Court a year and a half ago or so.

MR. MOSELEY: Approximately July of '76, your Honor.

THE COURT: We had extensive hearings about that, at which time Mr. Boudin even made more precise his clients' claims against the government. After that was done, we had a discussion as to whether his administrative claim was too late, and so forth.

That is all down on the record, but as so often happens, the discussions in Court went way beyond what was in the briefs. Although it is somewhat tortuous to get through all of that, there were points that needed to be clarified.

There is a lot in the hearings that was not in any brief or affidavit. Therefore, one has to go over the whole business to really find out what positions were taken at that time and so forth. I have asked my law clerk to go into that again, to review all of those materials.

I want to refresh my memory as to what exactly went on. Whether we have a preliminary trial or whether you go up into more appellate review, it still ultimately is going to be important to go over that and know exactly what transpired and get that fresh in mind.

Although it wasn't in any decision filed, the ultimate ruling I made--you are aware of it

and everybody concerned with the case was aware also--was that as far as the question of the timeliness of the administrative claims--I think that was the gut issue on the statute of limitations problem--as far as that issue was concerned, the timeliness depended upon when the plaintiffs knew or should have known about the matters covered in one or more administrative claims.

If they knew or should have known about those matters two years or more before the filing of those claims, they are barred, to the extent such a situation should be found.

If they didn't, then they are not barred.

The government took a position that the original complaint in the action indicated that the plaintiffs should have known of all the claims made in administrative claims two or more years after the filing of the complaint.

We had a long discussion about whether that

is an acceptable way to handle the problem or not. I concluded--and I think I would conclude today, if I was deciding the motion today--that that is a drastic oversimplification of the problem, that it was perfectly apparent to me from a reading of the complaint that the plaintiffs had some information on which to base a complaint, but that at later points in different stages they learned much more about claims, and that the time when they knew or should have known of all or most of what they are claiming against the government because of the activity of the FBI--the time when they knew or should have known of those matters occurred well after the filing of the original complaint.

To the extent that they knew or should have known the matters covered in the original complaint, if that was two or more years before the filing of administrative claims, all of that should be barred.

But that does not begin to cover the entire case. In any event, I did not attempt rule conclusively even as to what I am saying, because I held, I believe, that these raised issues of fact. The issue of when the plaintiffs knew or should have known of certain claims, these are issues of fact.

I further felt that the issues of fact as to when the plaintiffs knew or should have known of the claims against the FBI was very much bound up with the evidence as to what those claims were and the evidence about not just what the claims were in a pleading sense, but the facts about what underlay those claims.

We can talk forever in theory about whether the plaintiffs have a good cause of action for tresspass or interference with relationships, but we don't really know much about it until we get the evidence.

My feeling was--this was what I ruled--that you have a complex range of issues of fact which relate to the merits, which relate to the questions of knowledge or when knowledge should have occurred, and certainly it was inappropriate on the basis of a few pleadings and affidavits to decide those issues.

The net of it was that I felt that evidence had to be developed, whether it related to questions of knowledge on the part of the plaintiffs or questions of merits, and there they were probably very, very closely intertwined.

That is what led to the discovery proceeding.

* * *

The suggestion that there has been ample discovery is simply incorrect. The fact that lots of sets of interrogatory answers have been filed and lots of documents have been produced, that is just totally beside the point. Anybody

who bothered to go over the record and see what was produced and was not produced would know that in an instant. Well, not in an instant, but they would know it.

Just to elaborate slightly on that point, during the production of documents which was had from the FBI, the topics of that production were all discussed in a hearing that we had.

MR. MOSELEY: In April and May of '76, your Honor?

THE COURT: Right. At that time certain topics were selected, certain types of activity were selected, and the FBI was to produce documents. At that time -- this is terribly important for anybody to realize, if they are going to get to first base with this problem -- the problem of discovery about informants was simply deferred. It was with full knowledge that the informant activity was the most important activity

undertaken by the FBI against the YSA. The record is replete with that. It was decided that the FBI would produce the documents on subjects such as burglaries, wiretaps, any kind of disruption activity, such as poison pen letters, etc., etc. There was a list of ten or twelve activities at issue in this litigation. One of the ten or twelve was the use of informants. It was decided that the FBI would produce the documents on all or most of the other topics. Right, Mr. Moseley?

MR. MOSELEY: That is generally correct, your Honor.

THE COURT: Fine. As to the informant subject -- which we understood was an extensive subject, difficult subject because it was the most important activity of the FBI against the SWP, and at the same time it was impossible to produce those documents without yielding up what the FBI considered was confidential information --

because of that very difficult problem, there was no discovery on that subject at that time. It was deferred. It was deferred, and the device that was attempted as a preliminary thing was that instead of the production of the documents on this subject the government would answer interrogatories. It was understood that that was a first step.

The idea of having the interrogatories done was to take the subject of the informants in very slow, very careful steps, see what could be done with the interrogatory answers, and go from there. At no time was it agreed that there would be no production of informant files or that the interrogatory answers would do the whole job. It was simply a recognition that this was a difficult subject and would be taken in slow steps.

The interrogatory answers came in. The interrogatory answers, I will state categorically,

do not supply anything approaching information which could possibly meet the evidence requirements of a plaintiff or a litigant in any case tried practically anywhere. They are bare bones; they furnish some preliminary information, and that is all.

We also found last summer that to some extent they were incorrect and incomplete, even as to the topics covered. The history of the summer of 1976 is history. The Redfern matter came up, showing what was obviously an intentional falsification in at least one interrogatory answer furnished by the FBI. The Redfern file, since his identity as an informer was disclosed, his file was produced. About six or seven other files were produced voluntarily of informants whose identities were known to the plaintiffs. That production was almost a fortuity. Redfern's identity was known through a fortuity, and

from some other means, the plaintiffs learned or six or seven other identities of informants. Nobody ever thought that these were the most important informants or, to say the least, that they were complete, since they were six or seven or eight out of 1300.

All of which is to say that, despite all the labor and despite the thousands of documents produced at that point or how many interrogatory answers or how many sheets of paper or forms had been filled out, the subject of the disclosure of the evidence about informants simply was not solved. Nobody contended it was; nobody contended that the discovery was complete on that issue. If anybody so represented to the Court of Appeals, they were simply falsifying.

That led to the proceedings of the winter of '76 and the spring of '77, which we all know about, and the motion of the plaintiffs for the

production of 19 informant files, which they had selected out of the 1300, because they felt these were representative samples. What I am getting at it -- and there is more to be said -- is that I feel that it is really beyond any contest, if anybody looks at the record, that the discovery on what I will repeat is the most important activity of the FBI against the plaintiffs was never completed, it was barely begun. It is very unfortunate that there was a lot of other documents supplied. It is unfortunate that people had to go to work in sanitizing those other documents, and so forth, but that is the nature of this case. This case is not a simple case. It is just the nature of the case.

If the plaintiffs don't have any reason, any legitimate reason to go to trial on damage claims because of the use of informants,then of course there would be no reason in the world to have

the production of these files. Let me phrase it another way; I am trying to think out loud on the issue. If the government had been right or were right today that the damage action against the United States of America because of the FBI activity, if the government is right that that claim should be dismissed or that there is no valid reason for a trial on the merits of that claim, then to me it follows unequivocably that there is no reason for the discovery of these files.

However, if there is a triable damage claim against the United States because of informant activity, there is no way in the world for that to be handled in any just and fair manner without the evidence. That evidence has not been produced. There is no question about that in my mind, whatsoever, that that evidence simply has not been produced. There may be all kinds

of knowledge of certain types of activity. The record is fairly clear that certain types of activities were undertaken: burglaries; other forms of misappropriation of documents; certain disruptive activities,and so forth. I emphasize the word "type." I don't know of anybody, any plaintiff who can go to trial on a damage claim and simply tell the jury the "type" of activity that was engaged in by the defendant.

Let us suppose a malpractice action. Let us suppose that the plaintiff sought to introduce proof about what went on in the hospital: she had an operation; she came out of the operation; she had a certain severe problem in her throat, something seemed to be stuck there. Then the plaintiff's attorney sought to ask her about the extent of the pain: what physical manifestations were caused, how long they were caused, and so forth. The judge said, "I know the type of the

activity, and that is all that is needed."

That would be absurd. This is an elementary illustration. Isn't a plaintiff who is seeking to prove damages entitled to show the extent, the magnitude, the duration of the problem? It generally makes the difference between whether the damage award in a particular kind of case is $10,000 or 10 times $10,000 or less than $10,000. Isn't a plaintiff entitled to show that she was in pain for seven weeks versus one week?

That is basically what we have here. We may know a lot about the types of activity. When I say "we," the publicly disclosed evidence may show something about that. But does it show the magnitude, the number of people affected, the number of branches affected? Is there anything in the record so far that any trier of fact could use to make an intelligent assessment of the quantum of damages? There is not. If quantum of

damages is irrelevant to this case, then maybe we have got a different story, but I assume that in a damage case you are worried about the quantum.

This is not a simple malpractice case. This is a case where the plaintiff organization consists of chapters, it consists of members. You have got activities of one kind or another that are alleged to have gone on here and there, different kinds of activities over different periods of time, and so forth. It is a long way of saying that if the government is going to think intelligently in the future, or anybody else is, why, that is at least one important reason for not passing off this document business as simply duplicative of what has already been produced. If anybody suggested to the Court of Appeals that it was duplicative, I say quite frankly that you were misleading the Court. I don't know whether you did, but you certainly ought to correct that in any future proceedings.

* * *

APPENDIX D

Proceedings Before the District Court of
November 3, 1977

THE COURT: Since our last meeting my law clerk and I have been reviewing the materials submitted to the Court on the motion to dismiss the damages claim against the United States of America, and we have been reviewing the discovery materials in relation to the FBI informants.

Now, it is unfortunate in a way that we have to get involved in what in a sense is treading water, going over material covered over a year ago.

However, the Court of Appeals in its decision voices the view that there is a forcible argument that plaintiffs have no cause of action under the Federal Tort Claims Act.

And out of an abundance of caution I wanted to find out if there was indeed sound grounds for either dismissing the Tort Claims Act claims or having a preliminary determination.

I think that at each stage the Court ought to be reasonably flexible. Certainly the Court of Appeals' suggestions are ones that should be seriously weighed.

Now, I think that the renewed labor over this topic has really reinforced my view that there is no justification in dismissing the Federal Tort Claims Act damage claims against the United States of America under the present record or on the present record.

I have gone over this and my law clerk has gone over this at great length and with great labor in the last few days and weeks which, as I say, was a repetition and a review of the work that was done by me and another law clerk over a year ago.

Now, I think as you inevitably do, you learn some new things, and I feel that the review has been productive, and I hope it will ultimately be helpful.

I would like to try not to make a lengthy statement about this subject because the matter was pretty well covered in the minutes of those hearings in July of 1976, the last of which on this subject was July 29th.

I think the others were July 8th and July 13th.

Now, a great emphasis was placed by the government on the idea that the original complaint in this action filed July 18, 1973, indicated that the plaintiffs knew or should have known about the basic features of their tort claims against the government at the time of this complaint. The government insists that it is virtually conclusive evidence of knowledge of the nature of the tort claims against the government.

The government further contends that there was no administrative claim filed until about two years later.

I think the first administrative claim was July 17, 1975. And the government would, of course, argue that whatever was known and whatever was presented in the complaint wasn't suddenly known on July 18, 1973, so it must have been known at least a few days earlier, and the net of it being that whatever was known at the time of the filing of the original complaint was known more than two years before the first administrative claim.

Now, the administrative claim filed on July 17, 1975 was on behalf of the Socialist Workers Party and the Young Socialist Alliance against the Federal Bureau of Investigation, and it referred to the so-called Socialist Workers Party disruption program.

There was a second administrative claim filed on July 22, 1976, again on behalf of the Socialist Workers Party and the Young Socialist Alliance, and that referred to -- that was against the FBI and referred to the Communist

Party U.S.A. Counterintelligence Program, and the Counterintelligence New Left Program of the FBI, which is alleged to have affected the plaintiffs here, although perhaps not being denominated as such.

There was a third administrative claim filed July 22, 1976 on behalf of the SWP and the YSA against the FBI alleging that beginning in 1958 and going through to 1966, the FBI committed more than 100 burglaries in New York City and elsewhere. There were some administrative claims against the Secretary of the Army and the NSA. I'll put those aside for the moment. There was an administrative claim against the CIA. Again, I'm going to put that aside for the moment and I'm also putting aside the October 3, 1975, administrative claims on behalf of Sell and Starsky against the FBI.

This brings us to the final administrative claims against the FBI, which I don't think I

mentioned. There were two claims filed on October 28, 1976, both on behalf of the SWP and the YSA against the FBI, and one of them refers to the allegation that on hundreds of occasions FBI employees and confidential informants broke into claimant's premises and removed documents.

The other refers to the allegation that FBI employees caused confidential informants with the SWP and YSA to engage in a variety of activities including disruption of the normal organizational programs, manipulation and control of the organizations burglaries and thefts, and gathering information which was not lawfully gathered.

Now, the basic question as far as limitations is whether the plaintiffs who make these administrative claims knew or should have known of the causes of action, so to speak, more than two years before the filing of these claims.

Now, with respect to the pleadings, the original complaint does not name the United States of America as a defendant. It is against certain officials named by official title such as the Director of the Federal Bureau of Investigation, et cetera. It is then against certain named individuals such as Richard N. Nixon, Robert C. Mardian, Tom Charles Huston, and so on, and then at the end of the caption there is the nomenclature, "Unknown agents of the United States Government."

The original complaint sought injunctive relief and relief by way of damages against certain individuals, and that relief was solely sought under Federal law, under the First Amendment, the Fourth Amendment, under 42 U.S.C. 1983, under 18 U.S.C. 2520, and under 42 U.S.C. 1985.

The damages that were sought were sought from defendants Nixon, Ehrlichman, Haldeman, Dean, Huston and Mardian and the unknown agents.

Now, except for motions addressed to service of process, I don't believe there has been any motion to dismiss the original complaint for failure to state a claim, and I think it is safe to say that as a matter of pleading these Federal claims are well pleaded. Whether they have merit or not on the facts, that remains to be seen.

MR. MOSELEY: There was indeed a pending motion as to Mr. Nixon.

THE COURT: That is right.

MR. MOSELEY: In his official capacity.

THE COURT: Because of his official capacity. But I think the fact remains that as far as the ability to plead claims under these Federal laws against these individuals, either for injunctive relief or damages, I don't think --

MR. MOSELEY: There is no motion.

THE COURT: All right, thank you very much.

If I recall correctly, the first pleading

against the United States of America for damages was in the second amended complaint.

Isn't that right?

MR. MOSELEY: It was actually in the first amended complaint, your Honor, which was filed in May of 1976, but circulated, I believe, earlier, approximately in April.

THE COURT: Let's say the first pleading against the United States was May of 1976. Then there was a good deal of clarification introduced by a pleading in the second amended complaint --

MR. MOSELEY: Actually filed in October, though it had been circulated some time before that.

THE COURT: We were using it. The second amended complaint was in effect at the time of the July, 1976, hearings. We were relying on it and discussing it.

MR. MOSELEY: That is right.

THE COURT: Again, as we did at that time, I have analyzed the first complaint and I have analyzed the affidavits as to what was or was not known about damage causes of action at the time of the first complaint back in 1973, and I would just like to repeat some of that for the moment.

In general, it seems to me that the information which lay at the basis of this original complaint was tentative. Certain specific acts and activities were alleged, but in general the perpetrators of those acts and activities were not known as far as can be seen from the pleading. The first complaint does not reveal to me any knowledge which I would require or make possible a specific Tort Claims Act violation against the United States of America directed at a particular agency, specifying the date and place where the acts are committed, indicating the type of tort referred to, and so forth.

Now, there were specific acts known and alleged. There were certain further alleged burglaries. For instance, in Paragraph 66 there is an allegation that the SWP had offices in Detroit entered. In Paragraph 67 there is an allegation that an apartment in Detroit of Charles Balduc was entered. In Paragraph 68 there is an allegation that an apartment of Norman Oliver in Brooklyn was entered. But Paragraph 69, says "On information and belief, the persons who planned and participated in the burglaries were agents of the FBI, the Treasury Department, the CIA,Department of Defense, the National Security Department agents, or all of them" I don't believe that the information possessed by the plaintiff was any more specific than that.

One other reference I want to make to the first complaint. There are allegations against the FBI beginning at about Paragraph 39. There

are allegations that the FBI singled out for interrogation and surveillance the SWP and its members and supporters in various cities.

In Paragraph 40 of the original complaints there is an allegation that on many occasions FBI agents attempted to induce members and did induce supporters of the SWP to become government agents for the purpose of spying upon other members and supporters and of interfering with lawful campaigning or organizing.

There is an allegation in Paragraph 43 that on many occasions FBI agents threatened to and did disclose members' affiliation with the SWP and the YSA to their families, employers, prospective employers, landlords and others with the purpose and effect of provoking hostility and discrimination against SWP members and supporters.

Thus the first complaint was based on certain information, but very incomplete information and it started an action which according to the

normal rules of pleading, would be susceptible to discovery and, furthermore, would be susceptible to amendments to add additional parties under the rules and to add additional claims or amend the claims to conform to information later uncovered by way of discovery or otherwise. Our rules provide for amendments to amend the nature of the claims and to change the identity of the parties, and that is exactly what has happened, and it has been a legitimate process.

Moreover, despite plaintiffs' lack of knowledge of many specific details at the outset and indeed to this day, the suit has hardly been a baseless fishing expedition.

Now we come to the first administrative claim. It is the claim of July 17, 1975, and it is in relation to the disruption program. It is perfectly clear, and the record leaves no doubt, that the disruption program was characterized by

activities such as poison pen letters and so forth which have been described in the Church Committee report. This program was revealed to the plaintiffs no earlier than the Fall of 1974. That is less than two years before the administrative claim of July 17, 1975.

The Disruption Program involved FBI activities substantially different from what plaintiffs knew or should have known before the fall of 1974. The evidence presently before the court strongly supports the view that the administrative claim of July 17, 1975 was timely filed.

As to the activities of the FBI in relation to the Communist Party COINTELPRO program, these were first revealed to plaintiffs in the fall of 1974. Thus, as far as the evidence now on record shows, the administrative claim of July 1976 on this subject was timely.

It is clear beyond question that the revelations about the 92 or so burglaries by the New York office of the FBI came well within two years before July 22, 1976. In my view these specific burglaries furnished the grounds for specific claims under the Federal Tort Claims Act and there was no reason for the SWP or the YSA to know of them prior to two years before July 22, 1976.

Now we come to the two administrative claims of October 28, 1976, and they refer to the activities of FBI informants. This raises a question which involves some difficulty. Certainly the original complaint filed in July, 1973, and indeed the affidavits of plaintiffs' representatives indicate that in a general way the plaintiffs knew of the use of informants back in the summer of 1973 and presumably before that -- in any event, well before two years prior to October 28, 1976. However, in order to make

a proper claim under the Federal Tort Claims Act, the claimant must allege the nature of the illegal act and the place where the act occurred, all with a view of proving a tortious act under the law of the place of occurrence. But it is clear that, due to the inevitable secrecy in which the FBI informants functioned, the specific nature and location of the informant activities have been largely concealed from plaintiffs.

In other words, plaintiffs had grounds to commence an action inJuly 1973 alleging serious violations of constitutional rights. Information obtained since then by discovery and otherwise has confirmed the gravity of these claims. And one important aspect of the case is the penetration of the plaintiff organizations by informants. But, as to what specific torts may have been committed under state laws by the FBI and its informants, this information is largely unknown

to plaintiffs even today. The primary source of such information is the FBI files, which, as yet, plaintiffs have not had access to. These files, some of which have been examined by the Court, indicate potential causes of action under state law, arising from informant activities, for trespass, conversion, invasion of privacy, interference with business relationships, possible violations of state statutes and constitutions, prima facie tort, and possibly others.

I return to the two generally stated administrative claims about informant activities filed October 28, 1976. Certainly I cannot hold that plaintiffs knew or should have known their Federal Tort Claims Act claims for informant activities more than two years before that date.

Now, I return to the problem of whether the Court is providing for simply a fishing expedition in allowing plaintiffs' counsel to have access to

this evidence and information. The Court of Appeals warned that there should be precautions taken against disclosure for which there is no substantial need and to unnecessary rummaging in government files, and the Court of Appeals, of course, was stating the truth when it warned that here we have a particularly sensitive area because we have informant files.

I have attempted to conduct the discovery proceedings about the informant files in a manner which was as deliberate as possible, as cautious as possible, and to insure the absolute minimum public revelation of informant identities or information leading to a disclosure of such identities. That is why we consumed literally months and consumed undoubtedly a tremendous amount of labor on the part of the government and its lawyers and agents in the work that was done last winter which was to make sure this problem is dealt with as circumspectly as possible. But stating it in a

general way, it seems to me practically beyond contest that the plaintiffs have filed an action which is not a frivolous or substanceless action. The trial has not yet occurred and I don't know who will win or who will lose, but at every stage the action has been shown to raise grave issues and it seems to me that the discovery which the Court is now attempting to provide for is anything but a fishing expedition. It is designed to provide legitimate information and evidence to the plaintiffs in order for them to go to trial on the cause of action in order for them to find out information which will enable them to comply with the administrative requirements, all of which are legitimate objectives.

I have reviewed again the discovery thus far provided. I have reviewed the answers to interrogatories about the informant program, and without going into detain it is simply beyond any question that the interrogatory answers do not begin to

provide the evidence necessary for the prosecution of plaintiffs' claims. They were never intended to do this, and there is no lawyer that I can even conceive of who would believe that he could go to trial or prepare for trial on the basis of those interrogatory answers. It is my firm memory that they were intended to be preliminary only, and that indeed they were designed so they would not reveal either the informant identities or even enough information about the activities as to lead to the disclosure of informant identities. They were so designed for that purpose and that is the limit. They are preliminary only and they do not supply information about the activities undertaken, the places of those activities, the extent of the activities, et cetera, et cetera.

I want to conclude this statement by suggesting this: I know that the government has

obtained an extension of time in the Court of Appeals until November 16 in order to determine whether it will file for a rehearing or file for a Supreme Court review. I guess it is just rehearing.

MR. MOSELEY: Yes, your Honor, just rehearing.

THE COURT: I certainly have no intention of interfering with the jurisdiction of the Court of Appeals by ordering any production of files pending the completion of the proceedings in the Court of Appeals. I would, however,suggest this for the consideration of the government and of the plaintiffs' counsel: one of the things that I expressly attempted to cover in my ruling which, led to the Court of Appeals proceeding was the handling of the entire number of FBI informant files numbering some 1300. The actual motion for files related to 19 files. I think the government has conceded on one, so we are really down to a contested 18. I don't was to mislead the

government and I certainly don't want to mislead the Court of Appeals and lull anybody into thinking that the problem is less than it is, because what I said in my original ruling I meant and I mean, but I would perhaps offer this suggestion. I'm aware that any attempt to deal with 300 or 1300 files is a mammoth task and regardless of the informant problem, it is a huge task.

Now, I would welcome any suggestion as to the most efficient way to proceed to resolution of this case, and I think that I would like to suggest: I would like to suggest that we go forward with the production of the 18 files in question. I'm not saying I'm going to order it before the Court of Appeals finishes, but I'm just saying the appropriate time, when the air is clear on that subject, and if I'm not mandamused, I would propose this; I think it would be desirable as quickly as possible to get those 18 files produced, and, as of now, the Court of Appeals has said that it was in my discretion to go forward with

the proceedings which I did about those files. The public and the press and all gathered should clearly understand, if they don't already, that the production of those files was strictly to plaintiffs' counsel with the strictest orders that they not disclose any information therein or any names therein to anybody outside the circle of counsel, and I have no doubt, nor did the Court of Appeals, as to the ability and willingness of plaintiffs' counsel to comply. And I should say as an aside, that there was a further confidentiality restriction imposed at the time of our original proceedings and that was that even this procedure was not to be disclosed, and I will say that to my knowledge there was no breach of any particle of my direction by plaintiffs' counsel or anyone else, and that the only time and the only occasion when the procedure was disclosed publicly was when the Court of Appeals in its wisdom ordered the disclosure of the pro-

cedure. Up to that time I have no reason to believe that there was the slightest leak, the slightest violation of my admonitions.

Going back, I would suggest from my knowledge of those files that they are indeed quite a good sampling of what I believe is probably contained in a broad number of files. I think they are a far better sampling that the six or seven that were produced voluntarily in the summer of 1976. It is my faith that the plaintiffs will learn a great deal from the review of those files and that after they have reviewed them we will be able to get together and we will be able to discuss, I believe -- this is practically for the first time -- this intelligently with both the plaintiffs and the defendants participating exactly what claims can be legitimately made for damages, what cannot be, how to handle the statute of limitations problems, the question of whether a

preliminary trial on that issue might be useful at that point, and a lot of other questions which really are being held in abeyance now because the plaintiffs don't have the evidence.

I would be agreeable to any application after the plaintiffs have reviewed the 18 files, any application or any suggestion on how to proceed in the most efficient manner, including if the government applied for a preliminary trial on the statute of limitations at this point, I would consider the application.

The government suggests we have a simple trial on the statute of limitations now. I cannot accept that request. I believe that it would not add anything to the record which now exists.

Secondly, I remind you that at the July 29, 1976, hearing I must have said a dozen times that I would welcome an application from the government for a preliminary trial provided they would show that it would not be a long thing, getting

into the full merits of the case.

Now,I don't think that application ever came to me at least until after the work had been done on the discovery. It just does not make sense to me to now go back and pretend we are at September, 1976, and have a preliminary trial.

* * *

I believe that by having the in camera proceeding in which Mr. Boudin and his associates cooperated, I believe that the public disclosure of informants and files will be less, not more, than they would be if Mr. Boudin did not participate in that way.

If this is going to be a matter of the Court determining ex parte the files that will on an individual basis that will be disclosed publicly, I have a rather strong suspic.on that more files would be disclosed publicly than if we can work with Mr. Boudin on a confidential basis. That was one of the main reasons for adopting the pro-

cedure I did. And I have every confidence that that is the fact.

* * *

APPENDIX E

Proceedings Before the District Court of January 27, 1978

THE COURT: Good morning.

This is an in camera session attended only by the Court and by attorneys for the government and for the plaintiffs.

The transcript of this session will be under seal and until further order will not be disclosed to anyone other than the persons present, plus other representatives of the Department of Justice, and also representatives of the FBI.

The background of this hearing is laid out in prior transcripts, but to summarize briefly, the problem we are dealing with relates to the motion made in the fall of 1976 by the plaintiffs for the production of nineteen FBI informant files.

After a lengthy consideration of that motion I ruled in the spring of 1977 that eighteen of those files should be produced to plaintiffs'

counsel under confidentiality restrictions.

One of the files had been produced voluntarily so it is not in issue any longer.

This led to a mandamus proceeding in the Court of Appeals. There was an opinion handed down on October 11, 1977, defining the mandamus but making certain recommendations as to the conduct of discovery on this problem.

The government filed a petition for rehearing with a suggestion of an en banc hearing on November 16, 1977.

No word has been heard thus far as to that rehearing petition, although more than two months have elapsed.

This means that the discovery process on this crucial aspect of the case has been held up now for well over a year, and many months of that have been involved with appellate proceedings.

It has been discussed among the parties and the Court how to resolve the matter and avoid

further appellate proceedings, including a possible request by one of the parties for a Supreme Court review, even after the Court of Appeals has acted finally.

This leads to the proposal which I suggested to the parties and which I am going to make specific now.

Further, by way of introduction, let me say that I regarded then and still regard the procedure that I ordered last spring as having very distinct advantages, both to the Court and the parties. However, the FBI regards the procedure as having very distinct disadvantages from its standpoint, and has indicated in the Court of Appeals and to me that they strongly object to the fact that the District Court has not made a file-by-file review and exercised its discretion on this basis in determining whether a given file should or should not be produced.

This is a somewhat new position because originally the government didn't even proffer the files for inspection and made a blanket opposition. However, this is their current position and I regard it seriously, as I am sure it is intended to be taken.

Furthermore, the government has stated both to me and the Court of Appeals that it does not regard the confidentiality restriction to plaintiffs' attorneys as having any value to the FBI.

Implicit in this, and I think, expressed, is that if there is to be disclosure, it might as well be nornal disclosure by way of discovery.

My view of all of these problems is that there is no immutable right way or one right way to handle discovery. I am quite sure that there are or should be different means open to the discretion of the Court, and consequently I am quite willing to consider an alternative means of handling the discovery of the FBI informant files,

which I hope will permit us to get back to work in the preparation of the trial of the case, and avoid further appellate proceedings. At the same time I can recognize arguable legitimate positions of the different parties. Consequently, I propose the following:

I will nowoutline in some detail a list of the files which I propose should be produced in discovery and a list of the files which I believe should not be produced in discovery.

I am referring, of course, to the eighteen files in question.

In other words, to save repetition, I will simply state that in my view the files, which I would order produced, are files whose necessity in the litigation of this case strongly outweighs any interests of the FBI or the informants in confidentiality.

As to the files which I would not order to be produced I am not saying that they are not

relevant to the case nor am I retreating from the idea that if there could be or if there were to be a confidential production to plaintiffs' counsel, I am sure that the production of these files would have some value to the plaintiffs' attorneys in arguing and preparing their case.

However, it is quite apparent and it has been throughout the case that the discovery and the presentation of the evidence has to be made on a selective basis. It is simply impossible for the plaintiffs' attorneys or for the Court to deal with every scrap of paper in the informant files and to have all of this material received into evidence.

Exactly how the selection is made and what the selection is, is a very difficult problem, but obviously there are different ways of approaching it.

The files that I have selected for production, and I have several reasons:

One,is that I find that they have certain unique features as far as the informant activities of the informant. To some extent I find that they offer necessary and good illustrations of the types of activities which appear to have gone on, and that they can serve to some extent as what I might call prototypes of informant activities which probably are revealed many, many times through the files as a whole.

I have declined to produce or I would exclude from production files which I think are less helpful, where it is in the interest of the particular informant in confidentiality because of health or age problems or other considerations is quite pressing, and where I think that the evidence can be developed on a statistical or some other basis.

One other final introductory remark.

There have been long discussions over these

months as to the relevancy of this material to valid causes of action. I don't want to belabor that any further. To me it is absolutely obvious that these mattesr are of the greatest relevancy if this action is to be prosecuted further at all for injunctive relief or damages.

I have at times considered that the degree of discovery, if this were simply an injunctive relief case, would be less than if it were for the damage claims.

The cause of action for injunctive relief is still a very live one despite various alterations in the Justice Department process. The government conceded that it is a very live case and is proposing extensive discovery to rebut the plaintiffs' contentions of illegal and unjustified activity. So the cause of action for injunctive relief is undoubtedly going to turn out to be very much of a live cause of action, and of course, there are the causes of action for damages which

we have discussed extensively.

You have at the basis of the action a claim of a very serious violation of First Amendment, Fourth Amendment rights in the close surveillance of private, peaceful activities over many, many years. That's the plaintiffs' claim. It poses a very grave constitutional question.

The FBI, on the other hand, contends that its activities were justified, so that's the issue.

As far as state law claims under the Federal Tort Claims Act, I have been over these before, but there is no doubt that the plaintiffs have triable claims under a variety of theories of state law, which they are entitled to go forward with and develop, and of course the defendants are entitled to attempt to rebut.

Those claims are the types of theories under state law which are trespass, conversion, misappropriation of property entrusted to someone's

care. I think the one term that is used is trespass to chattels, various possible violations of state constitution and state statutes - invasion of privacy, and the concept of prima facie tort which has to be taken seriously under the present circumstances.

Finally, to the specifics. I would propose to order the production of the following files. I will refer to these by number.

6: 53, 148, 220, 306, 311, 616, 1123, and I am also including 1321.

I would propose under these circumstances not to produce the files 73, 162, 176, 311, 675, 1007, 1121, 1211, and 1350.

I should note at the outset of the discussion that among the many considerations that I dealt with was whatever indication there was that the particular informant had or had not indicated a willingness to testify in court.

But, I also considered the testimony of Mr. Adams at the hearing of November 4, 1976, and his affidavit and certain documents produced.

I have particular reference to what is called SAC letter 68-14, dated February 20, 1968, which says in part, "As a general rule all of our security informants are considered available for interview by departmental attorneys and for testimony if needed."

Dealing with these on a file-by-file basis, the first is No. 6.

This informant served over a period of many years up to 1976, and held numerous positions in the SWP chapter, including recording secretary, delegate to the SWP National Conventions and membership on the local executive committee.

The file is remarkable for the sheer detail and breadth of the reporting.

The summary prepared by the FBI of the file itself is over 100 pages long. There are 22

pages of this summary containing lists of the very extensive amount of documents which were provided by this informant to the FBI.

This informant reported on the chapter's discussion on the split of the so-called International Tendency Group from the SWP, and the readmittance of that group to the SWP in 1975.

A great deal of private personal information about SWP members was provided to the FBI on a continuous basis.

On certain occasions the informant indicated an unwillingness to testify, but the FBI considered that informant under certain circumstances should be considered available to give testimony.

It is perfectly clear from the summary that the very extensive document production made by this informant to the FBI resulted from the access which this informant had to documents by way of being recording secretary and having other

positions.

Due to the type of questions asked in the interrogatories, to the FBI, it was not literally required to reveal that this person had the post of recording secretary and was a member of the executive committee.

The interrogatories did ask how various documents were obtained and for most of the documents, the answer is "unknown."

That really constituted misleading answers because it is perfectly obvious from the file that the reason all of his great amount of documentary material was taken and produced to the FBI was that the person had the position of recording secretary, executive committee member, and so forth.

However, this was not revealed in the answers. I regard the answers to the interrogatories as misleading and incomplete.

I will now deal with No. 53. This is a situation where the informant was not an SWP member, but was a confidant of a high ranking SWP officer, at least within the whole branch.

Through this confidential status and friendship the informant really had access to and was privy to the decisions and deliberations that went on in the SWP branch.

(Deleted by order of the District Court)

Naturally this gave the informant access to documents, and documents were thus turned over to the FBI.

This informant received very substantial compensation during the time of activity amounting to $250 to $350 a month, depending on the particular time period. This informant turned over intimate personal information which she had obtained, including information about cohabitation of SWP members, education plans, travel plans, employment plans, health and drinking

problems. This information was provided continuously and in great detail.

The method of obtaining the documents was readily apparent from the files, and for some reason, whoever answered the interrogatories either listed "unknown" in respose to the question of how documents were obtained, or made some other types of answers which carefully avoided revealing the actual relationship and methods used.

It should be noted that upon the arrest and investigation of an informant Timothy Redfearn on unrelated matters, and the revelation that the answers to interrogatories about the FBI informants were false at least as to Redfearn, the FBI filed supplemental affidavits purporting to correct certain of the interrogatory responses. These corrections were made in October 1976. The original responses were filed in June 1976. I

should say that, even if the interrogatories had been answered with total accuracy and completeness, the answers would in no way substitute for the detailed evidence contained in the files which I am proposing to produce. The interrogatories and the answers thereto were never intended to take the place of detailed evidence.

In a supplemental affidavit filed October 15, 1976, about No. 53, the FBI sought to correct the statement made in the interrogatory answers that the mode by which this informant obtained documents was unknown. The affidavit stated the "informant had regular access to documents and premises controlled by SWP and YSA sources." However, as noted above, even this response is incomplete in failing to mention the friendship of the inform ant with a high-ranking SWP official (deleted by order of the District Court).

This informant who has consistently indicated that she didn't desire to testify or be dis-

closed -- I might say as a general thing here, and I think it is probably covered by what I have already said, that I have carefully considered any indications of the lack of desire for disclosure or testimony, and where I have decided that files should be produced I obviously believe that the necessities of this case outweigh any interest of the informant in not being disclosed.

I particularly have in mind, among other things, that these informants were very well compensated financially for their work and also I am convinced by the other materials in the record that they were well aware of the possibility that they might have to testify if circumstances made this necessary.

The next file to be produced is 148.

This is an informant who worked for the FBI over a period of several years informing both on the YSA and the SWP.

In addition to the most extensive reports, two or three times a month, on meetings and political, organizational matters, the kind of thing found throughout all of these files, there is a remarkable relaying of intimate personal information which is above and beyond what is found even in the extensive informing of this type in other files.

We have the most detailed description of the activities of SWP and YSA members as far as who they were living with, who their boy friends and girl friends were, employment, marriage plans, educational plans, physical descriptions, residences and phone numbers, et cetera, et cetera.

Of particular importance this informant was described by the FBI as its most valuable Trotskyite informant in a very large metropolitan area.

This informant received substantial compensation, up to $350 a month plus expenses.

Commencing during the time this lawsuit was pending, this informant provided the FBI with information about discussions, about the present lawsuit, discussions about the so-called political rights defense fund.

This informing went on for a period of ten months before the FBI said that it should be stopped.

There is no doubt in my mind that the plaintiffs should be able to pursue the question of whether confidential strategy information was provided by the FBI on the handling of the present lawsuit.

The answers to interrogatories carefully avoid disclosing a member list relating to the political rights defense fund, which was in fact produced to the FBI by this informant. Such information was called for in the interrogatories and the answers were incomplete and misleading

in not revealing the information.

There are other omissions from the documents listed in the answers to the interrogatories which were noted by me.

The description about the method of obtaining what documents were disclosed, the answer is unknown. It is just an imcomplete and misleading answer.

This informant has indicated the desire not to testify. However, as I said, I believe that this informant's disclosure of this file clearly outweighs any interest in confidentiality.

File No. 220 is the next one that I will describe. This informant held many posts of rank in the SWP chapter, and other entities. This informant was a delegate to national conventions, a financial director of the local branch, a member of the executive committee of the local branch at various times, director of a fund drive, and an alternate to a national convention.

I want to pause here to indicate something that I have discussed before, but I will describe it in some greater detail.

As we all know, one of the strongest arguments that has been made by the defendants in this case as to justification for a surveillance of the SWP has been the connection of the SWP with the so-called Fourth International.

This was probably the prime argument against the preliminary injunction which I entered in late 1973, I believe, and which was reversed by the Court of Appeals.

The argument both to me and to the Court of Appeals, in that argument there was very heavy reliance on the idea that surveillance of the SWP and the YSA was justified by this connection with the Fourth International.

This remains a very important issue in the case, and an issue which will have to be probed

carefully and thoroughly in discovery.

Now, some of the files which I am proposing should be produced involve information about Fourth International matters and about the factions which grew up within the Fourth International and within the American Party relating to something which I can't go into in detail now, but the parties are all aware of this, that is relating to certain resolutions passed by the Fourth International advocating violent activity in Latin America.

This caused a great factional dispute both in the International and in the American Party.

In some of these files that I am ordering produced, there is extensive material about discussions by the various factions and about the various factions and about the issues.

I regard it as most important to have this information produced in discovery so that it can be developed further. There is a serious question about these issues, about the Fourth International,

and the internationalist tendency, and so forth, whether they were really reflecting an actual plan or any actual activity of a criminal nature by the party members in the U.S. or whether they simply were reflected in academic and parliamentary and ideological discussions.

Now, File No. 220 relates to an informant who reported to the FBI extensively about the Fourth International, he reported on the speech by a Fourth International member named Livio Maitain at a convention. He reported about Fourth International matters discussed at a SWP plenum. The FBI listed as a topic of special interest with regard to this informant the Fourth International.

Aside from this, there is another informant who gave the most extensive personal information about SWP members, including the sexual preference, and, of course, the topic of homosexuality

which was related to that, pregnancies, marital infidelities, health and physical health and mental health problems, employment information, and so forth and so on.

A very large number of documents was produced by this informant to the FBI, including personal correspondence between members and personal correspondence between the organization entities and the members, as well as financial reports, and so forth. This informant was well-compensated, in one year earning more than $4,000.

This is a situation where it appears from the face of the summary given to me that the FBI at least desired to use this informant to disrupt the activities of the SWP. What actually happened would have to be gone into in further discovery. However, the files indicate that this informant was classified by the FBI as being in

the position to serve subtly as a deterrent. The answers to interrogatories give only the barest indication of the latter, and are misleading.

I should note at this point what is obvious, that even though the FBI may not expressly advocate or urge or instruct a particular informant to act as a disruptive force, there is an inherent disruptive force simply by the fact that informants occupy particularly officers and executive committee roles, policy-making roles where they have a very clear conflict of interest by virtue of their position as FBI informants.

At least that is a valid claim of the plaintiffs here, which they should have the opportunity to develop and, of course, the FBI should have the opportunity respond by way of their evidence and arguments.

The next file to be dealt with is 306.

This is an informant who functioned over a period of many, many years, and in addition to the extensive organizational and political reporting, a reporting on organization and political matters which the informants always gave the FBI, and in addition to the reporting of personal information, this is another instance where there was very extensive reporting to the FBI on Fourth International matters.

For instance, at a particular time, this informant reported on sending of Peter Camejo to Argentina. This informant reported about some matters relating to the Irish Republican Army. This informant reported about the SWP relationship with the Paris office of the Fourth International.

This informant apparently had information about the tactics of the various factions and discussed and reported to the FBI on it.

It should be noted that a total of about 1300 meetings of the SWP and related groups were reported by this informant to the FBI.

Again, as I mentioned, we have the reporting of intimate personal information, including sexual relationships, births, deaths in the families, social contacts, education, travel plans, names, addresses, physical descriptions.

There were reports about upcoming job interviews among other things.

This type of material is significant because of the activities which were claimed to have occurred by way of the FBI using this information to harm SWP members in prospective employment, family relationships, et cetera, by the use of poison pen letters and other methods.

Again, these are not issues that I am trying to make findings on, but I am trying to outline them as issues to be litigated.

In 1964, this informant was advised that he might have to testify. This informant has expressly advised the U.S. Attorney's office here that he would cooperate in a lawsuit. However, recently, apparently he has indicated an unwillingness to testify.

I should say here that I think it is obvious that many of these indications of unwillingness have come up very recently at a time when there is public and press criticism of intelligence gathering methods. But I do not regard such unwillingness under these circumstances as justification for a failure to disclose the files which I propopose to have disclosed.

Again, the answers to the interrogatories are misleading and incomplete in the ways that I have referred to with regard to other answers.

The next one to be dealt with is 311.

This is a situation where the informant was an actual member of the so-called internationalist

tendency. This is the faction of the American Party which purported to support the pro-violence resolution or resolutions in the Fourth International.

This informant held high positions in the SWP and the YSA. This informant furnished the FBI various extensive information on the so-called international tendency, including information about contributions of the SWP and the internationalist tendency to the Fourth International, of participation by other SWP members in the internationalist tendency, activities of members and leaders of the Fourth International in the United States.

He reported about members of the American Party being assigned to the Fourth International Headquarters in Paris.

He reported very extensive personal details about SWP and YSA members,including cohabitations, marriages, marital problems, drinking

habits, et cetera, et cetera.

He obtained and produced to the FBI large numbers of documents of a confidential nature, including a copy of a position paper which was drawn up by a Fourth International member, which was clearly regarded with the utmost confidence by the party members.

There is an indication that the FBI considered that he could be used for counter-intelligence purposes.

He chaired meetings both of the SWP chapter and the YSA chapter and of the internationalist tendency group.

He received substantial compensation, more than $3,000 in one year.

Prior to very recently, he had indicated that he would testify if necessary.

The answers to the interrogatories were incomplete and misleading. For instance, there

was no disclosure of the fact that this informant had produced to the FBI the confidential position paper relating to the Fourth International, and there was no indication of the fact which I believe the files indicate, that the informant considered that this paper could be used in disruption activities.

The answers to the interrogatories purport to describe how this informant obtained documents, and I think it is well to read this answer, which is simply false:

"The information furnished was obtained by informer through public distribution and postings on bulletin boards of handbills, fliers, bulletins, newsletters, campaign literature, as well as public sales of literature and newspapers, and was obtained from other members of SWP-YSA as well as through general membership distribution during SWP and YSA meetings and functions."

In a supplemental affidavit filed after the aforementioned Redfearn matter, the FBI supplemented this response by stating a number of documents were obtained through the informant's legal access to a member's apartment. The answer is still incomplete, because the answer failed to fairly describe the fact that the informant had regular access to confidential documents by virtue of his positions as (deleted by order of the District Court) of the Internationalist Tendency.

The next file which I would propose to be produced is No. 616.

This again is a situation where the informant revealed extensive information to the FBI about the Fourth International and its relationship to the SWP, in addition to the very extensive disclosure of documents and other information about political and organizational matters and personal

information.

This is a situation where there could well be an overt robbery because he provided to the FBI the minutes of the YSA national executive committee, which were under what was called secure lock.

My notes indicate something which I will say, subject to correction, because the actual pages from the answers to the interrogatories are missing, from what the Government has given me this morning, but the Government can check this out.

My notes indicate that the answers to the interrogatories indicated that the only documents that were produced were routine public information, and if this is the case, that was untrue.

The following addition was made in the supplemental affidavit:

"Furnished literature and copies of documents which were routinely distributed by SWP and YSA to its members, and copies of excerpts of

documents available to the informant in connection with the position outlined in question 2(g)."

Although interrogatory 2(g) was responsive to the narrow question asked -- whether the informant was a member of any YSA local executive committee -- it failed to give a full picture of the number of positions held by the informant, any of which could and undoubtedly did lead to the obtaining of documents.

The next file to be dealt with is 1123.

This is a situation where a SWP member or a YSA member was expelled because of the suspicion that the informant was in fact an informant. In effect, we have a situation where the activity is basically already known.

This informant was a member of a three-person executive board of the YSA, of the local chapter, delegate to the national convention, and local editor of the Militant.

In addition to providing the usual organizational information about political discussions and organization discussions, this is another instance of the most extensive information being provided about personal and confidential affairs of the YSA members, marital problems, drug use, extra-marital affairs, cohabitation of one kind or another, medical problems, educational and employment plans, et cetera.

This informant provided extensive quantities of documents.

This is a situation where the files indicate that this informant was instructed and urged by the FBI to carry out disruptive activities, informant discussion within the YSA.

I studied the answers to the interrogatories and find them incomplete and misleading.

I believe that we are at the ninth file now, and that is 1321.

This is an informant who served for two or three years, held positions on the executive committees in the large metropolitan branch of the SWP, literature director, secretary, and also was involved with a YSA chapter. The reporting covered hundreds of meetings of the SWP over a period of many years.

This informant utilized his position to obtain great quantities of private documents of the SWP and the YSA and provided them to the FBI.

This information received very substantial compensation.

One small point, although possibly significant as a method here, is the fact that this informant was engaged in helping clean a member's apartment, and during the course of that cleaning found an address book which the informant turned over to the FBI.

This informant had stated at times the

willingness to testify if necessary, and recently he has indicated an unwillingness to testify.

Again, the answers to the interrogatories are incomplete and misleading.

Before I get to the files which I am not proposing to produce, I want to make one further general point: That is that among all the other things which these files show, which bear very crucially on the issues of this action, is whether or not by virtue of this long and intensive surveillance by the FBI, the FBI ever picked up any information about criminal or violent or revolutionary activities.

I would not attempt to make any finding on that, but I have done a fair amount of work in reviewing the files and the very extensive summaries of these files, and what generally appears from the files, and this is subject to further development in the litigation, but I

think it is important to discuss even for discovery purposes, that generally what appears to have occurred is that these informants were conducting the surveillance over a period of many, many years.

What they provided the FBI with was a consistent recital of peaceful, lawful, political activities, peaceful, lawful, personal activities, and a total absence of any criminal activities or plans of any nature whatever.

There may be slight exceptions to that, but they apparently are either rare or non-existent.

There is a very serious question about whe ther there could be any justification for this exceedingly close surveillance after this kind of record had been developed for a period of a number of years, that is, the surveillance with absolutely no indication of violent or criminal activity.

It raises a serious question as to why the FBI surveillance of these people and these organizations and these chapters was not discontinued, at least a decade or two decades or three decades ago, if it ever had any justification whatever.

Again, I am making no findings, but these are the issues which -- these are among the issues which make these files relevant and make totally incredible to me any argument that they are irrelevant and useless to this litigation.

I will go through with very,very little discussion the files that I am not ordering produced because I think the important thing is to get the response of the FBI and Justice Department to this proposal. However, I have given you the numbers.

Basically, what I feel is that these are situations where the evidence can be developed

without the identification of the particular informant. I think these probably are typical of many other files where we are going to have to work out some method of summerization and where the particular individual -- there is no need for the disclosure of that person. I find no reason to think that the plaintiffs would need to interview the person, take the deposition, or follow up further on this information.

(Deleted by order of the District Court)

In the case of No. 162, 1211, and 1121, these were non-member informants. For instance, a bank employee who gave information about banking transactions or a janitor who looked through trash, or somebody in the employ of a university who looked at the university files.

I don't for a minute say that these things are not relevant, but I must say that I see no utility in knowing that it was Mr. X or Mr. Y

versus just getting the information, having the information as to the nature of the activity in dealing on an anonymous basis.

That concludes my discussion. I would hope and I will direct that the transcript be typed up immediately, and I will expect that the U.S. Attorney's office and the FBI will consider carefully what is proposed.

The idea, as we know, is to indicate whether the production of these files could go forward without appellate review. The FBI would not, in my view, be -- it would not be a consent, actually, the only indication that we are concerned about is an indication as to whether this procedure would lead to further appellate review and further delay. That is really the issue.

I think that you can announce your position without really ultimately expressing it or consenting to it. Anyway, you can figure that out.

I would propose, if the FBI will state that it will not seek appellate review, then I would vacate my order of last spring, and then embody this proposal in some kind of an order, turn it into an order, and this would permit us to proceed forthwith with the discovery proceedings in this action. I would also intend, of course, to go forward with discovery of all other fronts including immediately entertaining the discovery requests made by the Government on the Fourth International subject.

I would hope very much to rule in that quickly and get this case ready for trial.

MR. JORDAN: Your Honor, I have one request, and that is in all of these proceedings on this issue up to now, even the in camera ones, Mr. Stapleton has been present and given access to the transcripts.

THE COURT: Do you have any objection to

Mr. Stapleton --

MR. MOSELEY: No, we have no objection, provided that it is limited to Mr. Stapleton. He has honored the confidentiality.

THE COURT: He certainly has.

Thank you very much.

APPENDIX F

Proceedings Before the District Court, February 10, 1978

MR. WOHL: * * *

Therefore, if the government were to comply with the disclosure order, it would in effect moot any confidentiality privilege that it has. The only way that it could obtain appellate review would be submitting to sanctions and seeking appellate review at the time of a final judgment. I don't mean to suggest by that or imply that even if appellate review were completed and the Supreme Court ordered the disclosure of certain files, that the government would comply with the disclosure order rather than accept sanctions.

* * *

THE COURT: I think that if and when the time comes when we are faced with this question of the refusal of the FBI to obey a final order for production of files, which I oppose, and if and when the time comes when we are faced with

what you spoke of at some length, this question of the refusal of the FBI to produce and the willingness to accept sanctions, that I would regard as a very unfortunate event as far as the public and the law enforcement processes and the justice processes of this country are concerned.

But I can't deal with that in advance. I will face it when and if it comes. I hope it never comes. We have a case where the claim is made that informants were not used for valid law enforcement purposes, but were used for purposes entirely divorced from any valid law enforcement motive. That is the basic nature of this important segment of this case. It goes without saying that this is not a frivolous, imaginary claim. Every development in the case thus far has added strength to that claim, rather than going the other way. I remain in a position where I realize that I am not deciding the case on the merits; I have said that many times and I remain

in that position, obviously.

But I am dealing with the question of how grave and how serious the questions are that are raised in order to determine whether to be involved in this difficult discovery. And there simply is no doubt that the questions are grave. You have a Senate Committee which made certain findings on the subject of the FBI's treatment of the Socialist Workers Party and the YSA, and we have the record in this case, and really, very little more needs to be said.

I have heard and carefully considered all the evidence, including the general evidence about law enforcement purposes and the relation of the informant confidentiality, and I have considered the specific files. I think I have said this before, but I am going to say it again: I do not accept the idea that it will prejudice the FBI in its valid law enforcement objectives in order

to turn over files of persons who engaged in surveillance of people who, as far as all the evidence I have seen is concerned, planned no crime, committed no crime, and did nothing but engage in peaceful activities.

To turn over such files seems to me to make little or no threat to the validity of informant programs in areas of valid law enforcement. People are informants as you and I well know, in the valid criminal areas for a host of motives. Many of them motives of self-interest. And I think that to assume that the psychology -- the psychological reaction of valid criminal informants is going to be all jeopardized and thrown into -- and destroyed or even jeopardized by the production in this case, I really think involves a psychological judgment which I just cannot accept.

The converse is to permit the FBI to con-

ceal instances of possible serious wrongdoing and serious violation of constitutional rights under the guise of the need to protect valid law enforcement objectives again strikes me as somewhat of a travesty. All right.

That is a way of saying that I very much hope that the FBI and the Department of Justice never confront the Court with this defiance and refusal to turn over in the statement, "We will accept sanctions." I am not sure that any type of sanction would really substitute for the value of the public interest in having this case tried and having the facts exposed to the public.

There is a value to that which is in the interest of our constitutional processes. But we may not ever have to reach that, and I hope we don't. But as far as where we are now, I will give you the opportunity this afternoon to do what I asked you to do the other day, and that

is to specify any of these proposed disclosures which the government feels would involve a breach of discretion or abuse of discretion under the applicable law.

* * *

I will, and I know it's late, but I am going to ask you if you wish to indicate those instances, Mr. Wohl, where you can argue that there was an abuse of discretion by production of these files.

MR. WOHL: At the outset on that score, I'd like to say that as a general matter we would regard it as extremely imprudent on our part to take a position in court that discretion had been correctly exercised without further talking to the informant to make sure that we and the Court had not perhaps overlooked something of great significance that the informant would point out immediately.

THE COURT: Look, Mr. Wohl. The Department has had a year and half to produce evidence on this motion. You are really now talking about finding out other evidence. And of all the things that have been suggested, that is probably the least appropriate. It just is not appropriate, you can refuse to tell me what your position is --

MR. WOHL: I'm not saying that, your Honor.

THE COURT: But I just cannot conceive of going out now and gathering further evidence; I suppose it would be in the form of affidavits from somebody that they have a particular situation. There has been plenty of opportunity for that. All right. Go ahead.

MR. WOHL: In any event, just by way of explaining what our position is, I am saying that we think that is a conditional thing that is a prerequisite to our taking a position that dis-

cretion was correctly exercised.

Now, with respect to arguments as to why it was incorreclty exercised, we would make -- and in addition, I would say that we would believe that if the Court saw any ambiguity in the summary or the file, there certainly would be appropriate procedures by which the Court could call for in camera questioning of the informant or the FBI agent. With that having been said --

THE COURT: I resolved any doubts against production.

MR. WOHL: All right.

THE COURT: And to me there was no ambiguity of the kind that would mitigate in favor of further hearings.

MR. WOHL: That having been said and also preliminarily, I'd like to say that I am not going to go into detail because we think that involves a serious danger of inadvertent disclosure and we are indeed concerned that some

of the informants may have become known to counsel for the plaintiff through the prior proceedings that we have had. And that is why my remarks would be rather general. If we feel the need to supplement that with anything specific, or the Court requests it, we would ask that it be allowed to be done through some form of ex parte submission.

MR. BOUDIN: Ex parte?

MR. WOHL: Yes.

MR. BOUDIN: You mean without us participating?

MR. WOHL: That's right. But I'm saying there may have been a danger that some of the informants may have been exposed. That having been said we feel that the Court inadequately weighed the consideration of the physical danger to the informant.

THE COURT: Is this a general comment?

MR. WOHL: Yes. And I'd like to say --

THE COURT: In other words, this would apply to all.

MR. WOHL: Well, it applies most particularly to one informant. That is No. 616.

THE COURT: Look, Mr. Wohl, I think it would help if you are just as clearcut now as you were in your earlier statement. That is, if the government would take the position that there was an abuse of discretion as to all of these, then you take that position.

If you take the position that there is an abuse of discretion as to particular ones, then you take that position. All I wish to kncw is what is your position.

MR. WOHL: Our position is that there certainly was an abuse of discretion as to some of the informants.

THE COURT: Which ones?

MR. WOHL: If I could just go on to say as to others of the informants, we are not in a

position to say that at this time because we feel we have to talk to them first.

As to Informant No. 616 -- and in addition, what I'd like to say is that it's the government's view that the Court considered some factors which should not have been considered at all and had no place in the balancing.

THE COURT: Just be as specific as you can.

MR. WOHL: On the factors or on the informant? I can do it either way. I was about to say with respect to --

THE COURT: What I really wanted you -- the main thing that I would appreciate knowing is whether you argue that there was an abuse of discretion as to all or to certain ones, and if it's the latter, which ones.

What you have told me is, so far, in response to that, that you feel now that there was an abuse of discretion as to some, and depending on what

information is gained from the discussions with the informants themselves, you may conclude that there is an abuse of discretion as to the others.

MR. WOHL: Right.

THE COURT: But in order to make some progress in the analysis, why don't you go through and apprise me of what the cases are where you now have concluded that there was an abuse of discretion, and outline whatever factors you wish to outline,and if you repeat one factor several times, I would not worry about it. The repetition is not of concern.

You started with 616.

MR. WOHL: The primary consideration there is the physical danger to the informant that would result from disclosure. We think that that is made clear on Page 32, Paragraph 3 of the informant's summary. We think that that is further clarified by the file that backs up that particular paragraph.

THE COURT: Just give me a minute.

MR. WOHL: Then I would repeat that I would request that we not have a detailed discussion of the information from the files.

THE COURT: I am just listening to you. Anything else on 616?

MR. WOHL: Just that your Honor referred apparently to an overt robbery --

MR. BOUDIN: Possible overt robbery, was the expression at Page 25.

MR WOHL: And we believe that to the extent that there was a conclusion of an overt robbery, that is at least not confirmed by the summary and if there is any ambiguity about it we think in the circumstances of this informant that should have been inquired into further.

I have a number of general factors which I think apply to several informants. I appreciate your Honor said that I could repeat them, but my

notes are not organized in quite that fashion. So what I'd like to do is go through each informant indicating what our objections are and then summarize the general factors after that, so as to make our position complete; emphasizing that it's very possible that our investigation that is going on during this period could cause us during the next week to ten days to withdraw our observations to certain of the orders -- or with the orders with respect to particular informants.

THE COURT: Let me say just on 616 I noted in my notes from the summaries the point that this informant had a fear of physical harm if identified. I took that in consideration, and in my view that fear expressed by the informant was outweighed by the importance of the information to the case which this informant could provide. And as far as the statement about the possible robbery, I was referring to something which was expressly

brought out in the file, that documents were taken, minutes of an executive committee, minutes of an YSA National Executive Committee were taken which were under what was called secure lock.

As in all discovery, the files don't answer all of the questions, but they raise serious questions which are worth exploring. So those matters were considered. If it helps you -- the only thing I ask, if you are going to talk about general considerations applicable to several files, just name the files.

MR. WOHL: That is what I am saying. I don't have my notes organized in that fashion, but I think their considerations are clear enough so it's pretty simple to go back to each one.

As to 53, our view again is that there in that situation is a substantial likelihood of considerable economic injury to the informant and the informant's family and that that injury would appear to be significantly greater than any injury

the informant even given the best case for plaintiffs, might have inflicted on plaintiffs. We also think --

THE COURT: Let me say that I specifically noted the alleged fear of this informant about what you are talking about, which was possible employment problem within the family. Again, it was a matter of weighing what I considered to be the value to the case, the essential nature of the evidence against the claim of this kind.

I wasn't considering that this informant had inflicted injury of an economic nature. I don't know that that is a particular consideration. But the point is that this informant, as I expressed it, had gained accesss to members of the SWP and the files in a unique way, and illustrated a type of activity which is important to be brought out in the case. But I certainly did consider the claim about economic injury.

Go ahead.

MR. WOHL: We realize that your Honor was attempting to be rather general in your Honor's statements so as to not inadvertently reveal informants, and we would hope that in the event you felt the necessity to make more detailed findings or statements you would do so in some kind of a limited opinion for the Court of Appeals.

THE COURT: I have no intention -- at the present time, I feel no need of doing that.

MR. WOHL: I am just putting on the record our view.

THE COURT: I think the statements are sufficient to show the consideration, and I think they are sufficiently general so as to not reveal anybody.

MR. WOHL: In any event, as to 53 and the other one I referred to earlier, 616, the government would request an opportunity to put in some form of affidavit to clarify and strengthen the

considerations it's relying on.

As to 148, again we believe that not enough weight was given to the fear of the possibility of economic reprisals with respect to this informant. We also think that the Court made a possible factual error with respect to a statement concerning a membership list. We think that a close reading of the summary, as well as the file backing it up at least leaves it quite ambiguous as to whether such a membership list was ever obtained, and if anything points in the direction against that inference, and again we believe that if the Court was arriving at such conclusion, an additional factual inquiry should have been ordered.

I'd like to just check my notes on 148 to see if we have anything else. Also here, as with respect to other informants the Court relies on substantial reporting of personal details by the informant. We believe that that was a common

practice concerning all informants and that the disclosure of any informant identities in addition to the ones that have already been disclosed for that purpose is inappropriate.

We do not agree with the Court's inference that the reporting by this informant-- I will withdraw that. If I am not mistaken on 148, that was the one in which the statement was made by an agent that this informant was a particularly effective informant. We think that that conclusion is a particularly inappropriate basis on which to order turnover, because that suggests that informants who are of the greatest value to law enforcement are most likely to be turned over, and that is why that we think is particularly an inappropriate consideration.

That completes what I have before me concerning 148.

THE COURT: I was fully cognizant of the

claim of this informant that the informant did not wish to be revealed because of embarrassment with friends and possible loss of job. That was far outweighed by the importance of the evidence and the statement really speaks for itself. As far as the membership list, I have commented here as I did in several cases about what I consider to be discrepancies in the answers to interrogatories.

I did this for the record as long as I had gone through the process of comparing the summaries with these answers to interrogatories. I did this because at times, including in the Court of Appeals, the government has made a great deal of the argument that ample information has already been given, and I think that it should be stated for the record that the answers to interrogatories, first of all, were never intended to be complete discovery; second, to the extent that they asked for information, in many instances the information was not completely given.

But I think I made it clear in my statement, and I will now, that the fact that there was some discrepancy between the facts and the answers to interrogatories, that is not a controlling factor to me, because as I have said, the answers to interrogatories were never intended to be more than practically an introduction to the subject. So that is what this membership list thing relates to, and it's really not a controlling consequence.

As far as this informant, this is an informant with -- the importance of this informant not in a law enforcement objective, but in something which from the evidence is something else, that is the reason for suggesting, proposing the production. Finally, as I indicated, the attempt was to some extent to have prototypes here, and the fact that certain of these informants did the same things, for instance, report on personal information, there may develop a certain repe-

titious or cumulative nature to some of this material.

But we have to realize that we are now dealing with eight files of informants, of member informants or confidants of members, out of somewhere over -- 00 [illegible]. There was prior production of a small number. And after looking at this evidence, I am convinced that the realistic picture of the evidence cannot be gained without some revelation of the details.

There simply is no substitute for what is seen in these files, as far as the details of this activity. Now, to say that the disclosure of this detailed evidence should be cut off at five files or 13 files, that is a difficult judgment. But I weighed that as carefully as I could; the desire to avoid similarly repetition and useless cumulation. And I took that into account when I viewed these files as necessary, particularly because they had certain features in common, which added

together helped to present the evidence clearer, would help and really was essential to the presence of the evidence partly because in each case they had certain unique features.

* * *

[O]bviously if the government came up with a strong factor which I had not considered, and which made me realize that my proposal was in error, I would be arbitrary in not listening to it and changing my proposal.

That is the reason I asked for this. Thus far, I must tell you I have not heard anything of that kind. But I want to hear it, and if you will bear with me, I will hear the rest of this. I don't think it will take long.

Would you go ahead.

MR. WOHL: Yes, your Honor.

With respect to Informant No. 6, that is

the one where the informant's activities, we believe, can be summarized in a manner that would be useful to the litigation, or adequately useful to the litigation to satisfy the needs of the plaintiffs. And we noticed on this particular one, it seemed that your Honor considered the length of the smmary as being of significance.

And we think it's appropriate to point out that part way through the summarization process, I am informed that the Court communicated to the government that the summaries were too long and therefore the agents who were preparing them should be instructed to try and pare them down and not make them so long. So as a consequence the length of the summary itself has a lot more to do with the summarization, and we think that is an erroneous factor to consider.

THE COURT: Anything else on 6?

MR. WOHL: If I could just have a moment.

(Pause.)

MR. WOHL: It appears to us that this summary indicates that the information that this informant obtained was information he was entitled to obtain, and as in most informant type situations, when parties deal with people, they are taking the chance that that person to whom they voluntarily disclose information might turn it over to the government.

Again, this is one that relates to the reporting of personal information. We believe that that can be put into the litigation without the identities. The government is prepared to admit that that was quite commonplace. That's all I have at this time on 6, your Honor.

THE COURT: You totally misconceive the basis for proposing that production of No. 6. There is no indication for any extensive discussion. I think your arguments are really -- they are just not even worth talking about.

MR. WOHL: All right. We have in effect specifically related to 220. We make the same point with respect to the summarization.

THE COURT: Anything else on 220?

MR. WOHL: We would like to provide additional evidence concerning this informant's physical condition and just as a general matter we don't see how this one would benefit the plaintiffs in the prosecution of their causes of action.

That's all we have on 220.

THE COURT: Again, your point misconceives the purpose of proposing the production of this. This is not an informant of advanced age, there is no indication in the entire time that this matter has been before me, there's been no indication that there is any problem about the physical condition of the informant which would be a factor.

MR. WOHL: This informant has apparently recently suffered physical disablement.

THE COURT: I would say this, if we get to the point of specifically dealing with this, there would be specific protections imposed that are appropriate. But this is an informant whose file is of tremendous importance to the case and should be produced.

Go ahead.

MR. WOHL: The observation we would make on 306, which is again another informant that we have not talked to is from the file it appears that we have the same situation of possibility of developing this information without revealing the identity.

THE COURT: Obviously if I had thought that I wouldn't have ordered production or suggested production.

MR. WOHL: On 311 we have the same thought concerning the ability to summarize the file or provide the information without the identity. The only indication that we saw of your Honor's reason-

ing was the -- I believe there is a reference to his membership in a particular faction or group. And while we can see why that might be a reason why the government might want to use that informant as a witness, we don't see how it's a reason why the plaintiffs are entitled to require disclosure of the informant.

THE COURT: I don't understand why you don't see that. There are two sides to every argument, and where the government may wish to prove that the connection with the Fourth International involved a danger and a reason for FBI surveillance, which was what was argued in the Court of Appeals on the preliminary injunction back in 1973, by the same token it would be open to the plaintiffs to introduce or attempt to introduce evidence that this association with the Fourth International led to nothing but peaceful debate, either among all the party or the majority of the party or whatever

the facts may be.

In other words, if the files about the Fourth International and the Internationalist tendency show that the discussions were peaceful discussions about ideology and about parliamentary, internal parliamentary maneuvering, et cetera, then this is material which is relevant to the defense of this case, just as it may be relevant to the -- not to the defense, but to the plaintiffs' position in the case, just as it may be relevant to the government's position.

In other words, it's relevant to an issue and it seems to me it's inappropriate to try to figure out at this point who it helps or who it hurts. It's similarly relevant to an issue. It's an issue which is somewhat hard to get evidence on and I regard that the files where the informants were involved with the Fourth International or Internationalist tendency as uniquely important.

MR. WOHL: If I could put our position on the record with respect to that, as we regard it, the International tendency and Fourth Internationalist issue is one put into the case primarily by the government as a defense. The question then becomes what evidence the plaintiffs are entitled to to rebut that. The only type of evidence in order to decide what you would use as rebuttal, it would seem there has to be some clarification of what the evidence of the defense is. Because if you have evidence that says somebody did something at a particular time and that caused the FBI to be justified in its suspicions or at least be prudent to go forward, the fact that somebody else can come in and testify that at some other occasion, these fellows were all nice fellows, we don't see as being directly related to that issue.

THE COURT: I think it is immaterial -- in the first place, the issue is in the case. It was

raised, it was the major feature of the government's position in the Court of Appeals. It has been talked about in briefs, in affidavits, at great length in various connections. It is the subject of a pending application by the government for discovery.

To say that the plaintiffs are supposed to wait until they hear the government's case and then have discovery and what they might do by way of rebuttal, it's totally impractical. I just reject it. What other arguments?

MR. WOHL: 1123 is one with respect to which the government can't really respond without talking to the informant. Therefore it's correct to say that I suppose at this time we have no specific point to make with respect to your Honor's exercise of discretion concerning that informant.

THE COURT: All right. That covered eight of the nine files. Obviously the ninth is 1321.

MR. WOHL: On 1321 we again see this informant as having nothing really unique other than just additional detail, and we think that if there is a possibility of pulling together this type of information through some kind of a summarization process, we think that 1321 is a good candidate for that sort of a process.

That is what I think we could make an objection along that line. Your Honor has asked us to state our legal position as of now. I think as to 1321 that is the one as to which there is the greatest likelihood that after our investigation we will withdraw our objection to your Honor's exercise of discretion. But at the present time on the state of the current record, I have said what our position is.

THE COURT: I think it's good to have that. We have objections now on nine out of the nine, which is an interesting response to the proposal,

and an interesting follow up to the strenuous plea to the Court of Appeals that the District Court should make a case by case evaluation.

And I will write a memorandum to the Court of Appeals the first of the week and apprise them of the position the government has taken. And of course the transcript is here so there is no -- there will be no occasion for any mistakes.

Thank you very much. It's very late and I think we should terminate.

MR. WOHL: May the record reflect that we have not completed our presentation of our view?

THE COURT: What do you mean by that? I will afford you as much more time as you wish tonight to complete it.

MR. WOHL: Thank you, your Honor.

Now, as I was saying, and I appreciate your Honor's patience, it could very well be that if we were allowed to respond a week from now, we

might not be objecting to all nine. So -- and I'd just like that to be very clear in case there is any doubt about it.

THE COURT: You mean because of getting the consents of the informants?

MR. WOHL: And because our investigation would convince us that it would be proper to turn over the files.

THE COURT: At any time when you withdraw, you change you position, why, you are free to apprise the Court.

MR. WOHL: Okay. Besides the specific analysis that I have gone through, I'd just like to put on the record the -- inappropriate where we believe that the Court considered factors which just should not have been considered.

The Court considered apparently in one or more circumstances the amount of money that the informant received. We believe that this is not

an appropriate consideration. Also the Court at least adverted to the errors in answers to interrogatories --

THE COURT: I dealt with that.

MR. WOHL: I just wanted to explain that in response to the Court's comments we have asked, originally immediately asked the FBI to look into that and explain their viewpoint and we had asked to have a written submission which would be ready next week on that point, but we have moved ahead on other points, points we feel more critical, but I want the Court to know that there will be a submission forthcoming on that.

That completes our position with respect to what our current response has to be at this time.

* * *

APPENDIX G

Proceedings Before the District Court of February 22, 1978

* * *

THE COURT:

* * *

It is not acceptable to me and -- if it had been anything that the plaintiffs were willing to accept from their standpoint, I would have considered it, but it is not and your suggestion is something which the plaintiffs object to, and from my standpoint, as the Court, I take responsibility for this proposal, even somewhat independent of the plaintiffs because I am the one who has seen the files and I made my proposal, and under the circumstances I had to, on the basis of an ex parte review of the files, or an in camera review of the files, and your suggestion, the Government's suggestion, is not acceptable.

I really don't think I have go to into detail. When I reviewed these 18 files I

reviewed it with the idea that the result of my review was that the nine was the minimum number which really could be taken from this group of 18 and which could have some hope of satisfying legitimate discovery objectives of the plaintiffs.

I still regard it as minimal. I think it presents some -- even the production of the nine, which is nine short of the 18 files, presents disadvantages to the plaintiffs which, unfortunately, they, not having seen the files, can't really argue about.

The order that I entered on May 31 was a much more satisfactory order in respect to the handling of this case because it gives the opportunity to plaintiff's counsel to review, argue about and deal with 18 files.

If we cut it down to nine files on the basis of my review and my judgment, that is already a reduction by 50 percent from what was requested by the plaintiffs.

To cut it down to four is something that in all fairness I could not countenance.

I feel an obligation -- since the plaintiffs have really not had any opportunity to see at any time the details of these files, I cannot simply bargain in this fashion and cut down to four the number of files to be produced. It would be grossly unfair and I will not do it.

The sole reason for the cut is the absence of consents of these informants and you must know that there is no justification for making that a condition. So the proposal as of now is rejected. I will do nothing further to deal with this proposal. The record is clear what the Government's attitude has been in response to the -- to what they argued too strenously about in the petition for rehearing, and in the event that it is necessary to bring that to the attention of the Court of Appeals or the Supreme Court,

why, the record is there for what it's worth.

As far as this question of sanctions, I think it is premature to get into that. I appreciate your warning and I will state to you and to the FBI that as far as I can see now it is not tolerable or acceptable to this Court to be told that the FBI will defy the order of the Court and accept what you call sanctions.

The purpose of discovery is not to lead to sanctions, it is to lead to discovery. The purpose of the Court order after all the litigation that we will have gone through by the time any official order is entered, is to get the order obeyed and I think you better reconsider any suggestion, even in advance, of the thought of sanctions. It will not be acceptable to me.

As long as you have suggested it, I want to give you advance notice that I will seriously consider contempt or imprisonment of defiant

officials, and I am sure you are aware of that, but I will not hesitate to use that power if there is a wilful defiance of a final order of this Court.

I want to know right now who has custody of those files. Where are they physically located?

MR. MOSELEY: Your Honor, custody physically of the files right now is, as to the nine for which I believe no disclosure is ordered, custody is in my office.

As to custody of the others, we had sent them down so that copies could be made and redactions could take place for this proposal, were it to be accepted.

THE COURT: I am directing you now to have all files -- that all files be brought to your office. They should be in this Courthouse and in this Disctict.

MR. MOSELEY: Within my office, your Honor?

THE COURT: Absolutely. Those files I am directing you, and I am directing the FBI, to have those files brought to the United States Attorney's office in the Southern District of New York immediately.

I am very hopeful that this unpleasant problem will never arise, but if it is necessary to entertain contempt proceedings against anyone, it is my view that the United States Attorney's office should be regarded as an attorney, not a custodian of the documents -- and I am perhaps disregarding the physical situation now, but I think formally this is the way the legal issue should shape up, I think that the matter, as far as contempt, would necessarily be a matter involving some person or persons at the FBI.

The United States Attorney's office, like any attorney, is simply representing a client and acting on instructions which any attorney must do.

I would not envision under any circumstances any contempt proceedings involving a United States Attorney.

What I really meant as far as the custody, I think that if this issue has to be dealt with -- I think that the Government -- although it may take a position that disagrees with my views, it is doing so seriously and not playing any games about it, and I think that the documents, the files, should be formally treated as in the custody of the FBI in New York City so that the issue can be joined in that way and nobody has to worry about geography of Washington versus New York.

Do you get my point?

MR. MOSELEY: I understand that, your Honor.

THE COURT: I am merely asking that the files be brought to New York. I will consider

them formally under the custody and direction of the FBI, although obviously the U.S. Attorney's office has to deal with them.

I will assume that in your dealing with them you are either dealing with them under instructions of the FBI or instructions of the Court.

So you are not personally liable for whatever happens to the documents. Do you get my point?

MR. MOSELEY: I understand that, your Honor.

* * *

APPENDIX H

Proceedings Before the District Court of March 10, 1978

* * *

THE COURT: * * *

I would like at this point to summarize very briefly the chronology of the events as follows:

The original motion which led to the proceedings was made on August 3, 1976 and that was a motion for the production of 19 FBI informant files. Those files were identified by numbers. No names or identities were contained in the motion nor have any names or identities ever been made public in any regard, but the numbers were taken from answers to interrogatories which were coded by number and revealed certain skeletal information about the informants without disclosing any identities.

As I said, that motion was made August 3, 1976.

During the ensuing months there were proceedings consisting of the submission of affidavits, consisting of the testimony of one or more FBI officials and most importantly of all consisting of the review by the District Court in camera of certain of the files themselves and the obtaining of lengthy summaries of the vastly more lengthy files, these summaries being prepared by the FBI and the United States Attorney's office.

Those summaries and the files have thus far been entirely and completely examined by the District Court under seal and no disclosure has thus far been made of any portion of those files or any portion of these summaries to plaintiffs' attorneys or to anyone else.

It was my view and remains my view that the matter of dealing with informant files is a matter which must be approached with great deliberation and that's the way in which I intend

to approach it.

After a review of the files, which was incidentally not suggested by the government or by even the plaintiffs but was entirely at my own insistence, I made an order on May 31, 1977 to the effect that the 19 files -- it may have been reduced to 18 by then -- that's right, by May 31st the matter in controversy had been reduced to 18 files. One file was no longer in controversy. I directed that the 18 files be produced to four specified attorneys representing plaintiffs and I directed that this be done under the strictest confidentiality and that the plaintiffs' attorneys were to inspect these files and make use of the information therein entirely on a confidential basis and they were to disclose no information obtained from these files, either to the public or even to their clients unless they were specifically authorized to do so by the Court.

I had the express agreement of Mr. Boudin and his associates that this direction of confidentiality would be scrupulously complied with. Beyond this, I directed that the procedure itself remain a matter of confidence and that it be disclosed to no one outside the number of the four persons, Mr. Boudin and his three associates and I believe that I have permitted knowledge of the procedure to be given to Mr. Stapleton of the SWP, but those five persons were not to disclose even the procedure to anyone outside their number, either other plaintiffs or the press or anyone else.

I think it should be noted that that latter direction was adhered to to the letter as far as I know and there has never been any contention by the government to the contrary.

No notice of that procedure ever appeared in the press until the government brought the matter to the Court of Appeals and the Court of Appeals

directed that the proceeding be made public. Of course the Court of Appeals was not directing that the information in the informant files be made public but it directed that the proceeding, the nature of the proceeding be made public, but until then there was to my knowledge no leakage whatever.

And I note this to confirm what I am thoroughly assured of and that is the reliability of plaintiffs' counsel and their willingness to scrupulously obey any directions of the Court as faw as confidentiality.

* * *

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